TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 337

ALEXANDER NORWOOD, JOSEPH F. TUNSTALL, AND JOHN E. SMALLWOOD, PETITIONERS,

vs.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 11, 1954

CERTIORARI GRANTED NOVEMBER 8, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 337

ALEXANDER NORWOOD, JOSEPH F. TUNSTALL, AND JOHN E. SMALLWOOD, PETITIONERS,

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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[fol. 1] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Civil Action No. 15810

ALEXANDER NORWOOD

v.

HONORABLE WILLIAM H. KIRKPATRICK, District Judge of the United States District Court for the Eastern District of Pennsylvania ex rel Atlantic Coast Line Railroad Company

APPLICATION FOR WRIT OF MANDAMUS OR PROHIBITION, OR BOTH—Filed July 13, 1954

To the Honorable the Judges of Said Court:

Alexander Norwood, by his attorneys, Richter, Lord & Farage, Esqs., respectfully represents:

1. That he is a resident and citizen of Chester, Pennsylvania.

2. That he is an employee of the Atlantic Coast Line Railroad Company, an interstate common carrier by railroad.

3. That on April 20, 1953, while in the employ of the Atlantic Coast Line Railroad Company on one of its trains moving from Miami, Florida to New York, the train was derailed as a result of which movant suffered severe, painful and permanent injuries.

4. That an action to recover damages for the said in-
[fol. 2] juries under the Federal Employers' Liability Act was instituted in the United States District Court for the Eastern District of Pennsylvania.

5. That the defendant is Atlantic Coast Line Railroad Company, and is doing business in and subject to service in the Eastern District of Pennsylvania; the Atlantic Coast Line Railroad Company has been duly served.

6. The Atlantic Coast Line Railroad Company, by its attorneys, did move for a transfer of the said cause of action under 28 U. S. C. A., Sec. 1404(a) to the United States District Court for the Eastern District of South Carolina.

7. That the said movement has been opposed on the grounds that the Federal Employers' Liability Act gives movant a selection of the District in which he may bring his suit, one of which is the Eastern District of Pennsylvania.

8. That this being a derailment cause, and one of absolute liability to which there is no defense, and most of the medical witnesses are either in Philadelphia or much closer to Philadelphia than to the United States District Court sitting in South Carolina, the burden would be greater on the movant to try the case in South Carolina than would be the burden upon the railroad company to defend this case in Philadelphia.

9. That the matter came for a hearing before the Honorable William H. Kirkpatrick, Chief Judge of the United States District Court for the Eastern District of Pennsyl-
[fol. 3] vania, and that an opinion has been filed as of this date, the 12th day of July, 1954, granting the motion to transfer. No order thereon has yet been entered.

10. That the accident happened in Dillon, South Carolina.

Wherefore, movant, by his attorneys, Richter, Lord & Farage, Esqs. moves the Court to issue a writ of mandamus or prohibition, or both, restraining the Honorable William H. Kirkpatrick from issuing an Order transferring this case to Florence, South Carolina.

Richter, Lord & Farage, by B. Nathaniel Richter, Attorneys for Plaintiff.

[fol. 4] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Civil Action No. 16174

JOSEPH F. TUNSTALL

v.

HONORABLE WILLIAM H. KIRKPATRICK, District Judge of the United States District Court for the Eastern District of Pennsylvania ex. rel. Atlantic Coast Line Railroad Company

APPLICATION FOR WRIT OF MANDAMUS OR PROHIBITION, OR BOTH—Filed July 13, 1954

To the Honorable the Judges of Said Court:

Joseph F. Tunstall, by his attorneys, Richter, Lord & Farage, Esqs., respectfully represents:

1. That he is a resident and citizen of Washington, D. C.

2. That he is an employee of the Atlantic Coast Line Railroad Company, an interstate common carrier by railroad.

3. That on April 20, 1953, while in the employ of the Atlantic Coast Line Railroad Company on one of its trains moving from Miami, Florida to New York, the train was derailed as a result of which movant suffered severe, painful and permanent injuries.

4. That an action to recover damages for the said in- [fol. 5] juries under the Federal Employers' Liability Act was instituted in the United States District Court for the Eastern District of Pennsylvania.

5. That the defendant is Atlantic Coast Line Railroad Company, and is doing business in and subject to service in the Eastern District of Pennsylvania; the Atlantic Coast Line Railroad Company has been duly served.

6. The Atlantic Coast Line Railroad Company, by its attorneys, did move for a transfer of the said cause of action under 28 U. S. C. A., Sec. 1404(a) to the United States District Court for the Eastern District of South Carolina.

7. That the said movement has been opposed on the

grounds that the Federal Employers' Liability Act gives movant a selection of the Districts in which he may bring his suit, one of which is the Eastern District of Pennsylvania.

8. That this being a derailment cause, and one of absolute liability to which there is no defense, and most of the medical witnesses are either in Philadelphia or much closer to Philadelphia than to the United States District Court sitting in South Carolina, the burden would be greater on the movant to try the case in South Carolina, than would be the burden upon the railroad company to defend this case in Philadelphia.

9. That the matter came for a hearing before the Honorable William H. Kirkpatrick, Chief Judge of the United States District Court for the Eastern District of Pennsyl- [fol. 6] vania, and that an opinion has been filed as of this date, the 12th day of July, 1954, granting the motion to transfer. No order thereon has yet been entered.

10. That the accident happened in Dillon, South Carolina.

Wherefore, movement, by his attorneys, Richter, Lord & Farage, Esqs. moves the Court to issue a writ of mandamus or prohibition, or both, restraining the Honorable William H. Kirkpatrick from issuing an Order transferring this case to Florence, South Carolina.

Richter, Lord & Farage, by B. Nathaniel Richter, Attorneys for Plaintiff.

[fol. 7] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Civil Action No. 16282

JOHN E. SMALLWOOD

v.

HONORABLE WILLIAM H. KIRKPATRICK, District Judge of the United States District Court for the Eastern District of Pennsylvania, ex rel. Atlantic Coast Line Railroad Company

APPLICATION FOR WRIT OF MANDAMUS OR PROHIBITION, OR BOTH—Filed July 13, 1954

To the Honorable the Judges of said Court:

John E. Smallwood, by his attorneys, Richter, Lord & Farage, Esqs., respectfully represents:

1. That he is a resident and citizen of Washington, D. C.

2. That he is an employee of the Atlantic Coast Line Railroad Company, an interstate common carrier by railroad.

3. That on April 20, 1953, while in the employ of the Atlantic Coast Line Railroad Company on one of its trains moving from Miami, Florida to New York the train was derailed as a result of which movant suffered severe, painful and permanent injuries.

4. That an action to recover damages for the said injuries [fol. 8] under the Federal Employers' Liability Act was instituted in the United States District Court for the Eastern District of Pennsylvania.

5. That the defendant is Atlantic Coast Line Railroad Company, and is doing business in and subject to service in the Eastern District of Pennsylvania; the Atlantic Coast Line Railroad Company has been duly served.

6. The Atlantic Coast Line Railroad Company, by its attorneys, did move for a transfer of the said cause of action under 28 U. S. C. A., Sec. 1404(a) to the United States District Court for the Eastern District of South Carolina.

7. That the said movement has been opposed on the

grounds that the Federal Employers' Liability Act gives movant a selection of the Districts in which he may bring his suit, one of which is the Eastern District of Pennsylvania.

8. That this being a derailment cause, and one of absolute liability to which there is no defense, and most of the medical witnesses are either in Philadelphia or much closer to Philadelphia than to the United States District Court sitting in South Carolina, the burden would be greater on the movant to try the case in South Carolina, than would be the burden upon the railroad company to defend this case in Philadelphia.

9. That the matter came for a hearing before the Honorable William H. Kirkpatrick, Chief Judge of the United States District Court for the Eastern District of Pennsyl- [fol. 9] vania, and that an opinion has been filed as of this date, the 12th day of July, 1954, granting the motion to transfer. No order thereon has yet been entered.

10. That the accident happened in Dillon, South Carolina.

Wherefore, movant, by his attorneys, Richter, Lord & Farage, Esqs. moves the Court to issue a writ of mandamus or prohibition, or both, restraining the Honorable William H. Kirkpatrick from issuing an Order transferring this case to Florence, South Carolina.

Richter, Lord & Farage, by B. Nathaniel Richter, Attorneys for Plaintiff.

[fol. 10] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,364

ALEXANDER NORWOOD

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

ORDER DENYING APPLICATION FOR WRIT OF MANDAMUS OR PROHIBITION—July 16, 1954

Present: Biggs, Chief Judge, and Goodrich and Kalodner, Circuit Judges

And now, to wit, this 16th day of July, 1954, it is ordered that the application for writ of mandamus or prohibition, or for both, filed herein on July 13, 1954, to be directed to The Honorable William H. Kirkpatrick, Chief Judge of the United States District Court for the Eastern District of Pennsylvania, be and the same hereby is denied.

By the Court,

Biggs, Chief Judge.

[File endorsement omitted.]

[fol. 11] IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,365

JOSEPH F. TUNSTALL

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

ORDER DENYING APPLICATION FOR WRIT OF MANDAMUS OR PROHIBITION—July 16, 1954

Present: Biggs, Chief Judge, and Goodrich and Kalodner, Circuit Judges

And now, to wit, this 16th day of July, 1954 it is ordered that the application for writ of mandamus or prohibition, or for both, filed herein on July 13, 1954, to be directed to

The Honorable William H. Kirkpatrick, Chief Judge of the United States District Court for the Eastern District of Pennsylvania, be and the same hereby is denied.

By the Court,

Biggs, Chief Judge.

[File endorsement omitted.]

[fol. 12] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,366

JOHN E. SMALLWOOD

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

ORDER DENYING APPLICATION FOR WRIT OF MANDAMUS OR PROHIBITION—July 16, 1954

Present: Biggs, Chief Judge, and Goodrich and Kalodner, Circuit Judges

And now, to wit, this 16th day of July, 1954,

It is ordered that the application for writ of mandamus or prohibition, or for both, filed herein on July 13, 1954, to be directed to The Honorable William H. Kirkpatrick, Chief Judge of the United States District Court for the Eastern District of Pennsylvania, be and the same hereby is denied.

By the Court,

Biggs, Chief Judge.

[File endorsement omitted.]

[fol. 13] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,364

ALEXANDER NORWOOD

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

No. 11,365

JOSEPH F. TUNSTALL

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

No. 11,366

JOHN E. SMALLWOOD

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

PETITION FOR LEAVE TO ADD EXHIBIT NUNC PRO TUNC—Filed July 27, 1954

To the Honorable the Judges of said Court:

And now come the plaintiffs, by their attorneys, Richter, Lord & Farage, Esqs. in the above entitled cases and petition your Honorable Court for leave to add as an exhibit to the application for writ of mandamus or prohibition or both the opinion of the Honorable William H. Kirkpatrick filed July 12, 1954 in the cases of Alexander Norwood v. Atlantic Coast Line Railroad Company, Civil Action No. 15810, Joseph F. Tunstall v. Atlantic Coast Line Railroad Company, Civil Action No. 16174, and John E. Smallwood v. Atlantic Coast Line Railroad Company, Civil Action No. 16282, and in support thereof aver that:

[fol. 14] 1. The opinion of the District Court holding that the cases before it, i. e. Alexander Norwood v. Atlantic Coast Line Railroad Company, Civil Action No. 15810, Joseph

F. Tunstall v. Atlantic Coast Line Railroad Company, Civil Action No. 16174, and John E. Smallwood v. Atlantic Coast Line Railroad Company, Civil Action No. 16282 would be transferred was based upon the holding of this Court in *All States Freight, Inc.* v. *Modarelli*, 196 F. 2d 1010 (C. A. 3rd, 1952). A copy of the said opinion is hereto attached and marked Exhibit "A".

2. In the opinion of the District Court it was stated that "if the stringent requirements of the doctrine of forum non conveniens found in the decisions of the Supreme Court prior to the statute are to be applied I would feel that none of the three cases could properly be transferred,"

3. In its opinion in *All States Freight, Inc* v. *Modarelli*, supra, this Court recognized that a conflict existed among the Circuits as to:

(a) Interpretation of Section 1404(a).

(b) Whether or not prohibition or mandamus would lie to correct an action of the District Judge under Section 1404(a).

4. In view of the conflict of decisions among the Circuits, your petitioners desire to petition the Supreme Court of the United States for a writ of certiorari to review and decide the conflicts now existing.

5. At the time of the filing of the application for writ of mandamus or prohibition or both in this Court, your petitioners' counsel did not believe it necessary to the presen- [fol. 15] tation of such application to attach a copy of the District Judge's opinion to the applications for writs of mandamus or prohibition or both, but your petitioners are advised by counsel, believe, and therefore aver that it would be necessary to present the District Judge's opinion to the Supreme Court of the United States in order that the questions may be properly raised and presented to that Court.

Wherefore, your petitioners pray your Honorable Court to enter its Order granting petitioners leave nunc pro tunc to attach as an exhibit to the applications for writs of mandamus or prohibition or both the opinion of the Honorable William H. Kirkpatrick filed July 12, 1954 in Civil Action

No. 15810, No. 16174 and No. 16282 in the United States District Court for the Eastern District of Pennsylvania.

Richter, Lord & Farage, by Joseph L. Lord III, Attorneys for Petitioners.

[fol. 16] EXHIBIT "A" TO PETITION

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 15810

ALEXANDER NORWOOD

v.

ATLANTIC COASTLINE RAILROAD COMPANY

Civil Action No. 16174

JOSEPH F. TUNSTALL

v.

ATLANTIC COASTLINE RAILROAD COMPANY

Civil Action No. 16282

JOHN E. SMALLWOOD

v.

ATLANTIC COASTLINE RAILROAD COMPANY

SUR MOTIONS TO DISMISS OR TRANSFER

Before KIRKPATRICK, Ch. J.

The Motion to Dismiss

The defendant's activities in this District as disclosed by the affidavits are exactly the same as those in Robinson v. Atlantic Coast Line R. R. Co., Civil Action No. 13711, 1953 (in which I held this defendant was not subject to venue jurisdiction in the Eastern District of Pennsylvania) but

the two cases are readily distinguishable. The Robinson case was a diversity case and, following the reasoning of Partin v. Michaels Art Bronze Co., 202 F. 2d 541, I held that inasmuch as the Pennsylvania Courts did not regard this corporation as subject to their jurisdiction, (Law v. Atlantic Coast Line R. R. Co., 367 Pa. 170) it could not be sued in a diversity action in a federal court sitting in Pennsylvania. [fol. 17] This case arises under the Federal Employers' Liability Act, and whether the defendant is subject to process here depends entirely apon whether it is doing business here, as that term is defined by the federal courts.

It is clear that federal courts, applying that Act, require less by way of business activities within the district to constitute doing business than the Pennsylvania court did in the Law case. As Judge Grim pointed out in Moore v. Atlantic Coast Line R. Co., 98 F. Supp. 375, 380. "Jurisdiction has been regularly sustained in 'solicitation plus' cases, that is, cases where foreign railroad corporations have engaged in business activities additional to the 'mere solicitation' of interstate business". In the present case I am of the opinion that the activities of the defendant in connection with its dining car service, fully discussed in the Law case, supplied the "plus" and I, therefore, hold that the defendant is subject to venue jurisdiction in this district.

The motions to dismiss are, therefore, denied.

The Motion to Transfer

It is quite clear that the Court of Appeals for this Circuit holds that the discretion vested in the District Court to order a transfer under Title 28 U. S. C. Sec. 1404 (a) is very much broader than I thought it was when I decided Naughton v. Pennsylvania R. Co., 85 Supp. 761. See All States Freight v. Modarelli, 196 F. 2d 1010. It makes a difference in this case, because if the stringent requirements of the doctrine of forum non conveniens found in the decisions of the Supreme Court prior to the statute are to be applied I would feel that none of the three cases could prop- [fol. 18] erly be transferred. As it is, I think that the balance of convenience in all three cases is sufficiently in favor of the defendant to make the transfer proper.

The plaintiffs are all dining car employees of the defend-

ant and were injured as a result of the derailment of one of the defendant's trains near Dillon, S. C.

The proposed witnesses whose names have been supplied in affidavits by both sides fall into two classes—those who will be called in connection with the issue of liability, and medical witnesses whose testimony will have to do with the nature, extent and probable duration of the plaintiffs' injuries and disabilities.

As to the liability witnesses, the plaintiffs' argument against the transfer seems to proceed on the theory, offered in an affidavit filed by the plaintiffs' attorney, that "there can be little question of liability, and witnesses for the defendant on the liability question are not necessary." Of course, if this were so there would be very little reason to order the transfer, in view of the plaintiffs' choice of forum. However, the defendant asserts that it intends to contest this issue vigorously and lists some 24 fact witnesses whom, it says, will have to be called upon the point. From the summaries of what these witnesses are expected to testify to and from a consideration of the kind of defense testimony needed to disprove negligence in derailment cases, I am satisfied that a good many, if not all, of the witnesses will have to be brought to Philadelphia at considerable expense. I certainly cannot at this point decide, as the plaintiffs want me to, that the defendant has no case and, therefore, will not need any witnesses.

[fol. 19] The plaintiffs have listed some 48 passengers as possible witnesses but do not say how many they propose to call or what any of them can testify to other than the speed of the train, and it is difficult to see how more than two or three would be necessary.

On the medical side, the defendant proposes to call about a dozen doctors and hospital employees who have knowledge of the condition of the plaintiffs when they were treated at hospitals in South Carolina immediately after the accident. I am quite sure that very few of these will be needed, particularly in view of the fact that the plaintiffs have agreed to stipulate as to the authenticity of the hospital records.

There are, of course, other considerations. On the one hand, I have not overlooked the weight to be given to the

plaintiffs' choice of a forum. On the other hand, the condition of the court calendar makes it fairly certain that the cases cannot be tried in this district for at least two years.

Smallwood and Tunstall are residents of Washington D. C. Since their removal from the South Carolina hospital they have been treated and observed by physicians in Washington and Philadelphia. The Washington doctors, in any case, will have to leave Washington to testify in person.

Norwood is the only one of the plaintiffs whose home is in this district.The heavy balance of convenience in favor of the defendant in connection with the liability witnesses applies to him equally with the others but, on the face of it, he has a stronger case than the others with regard to the medical witnesses. It appears from an affidavit filed by his attorney that he has been treated by two physicians in Philadelphia [fol. 20] and two in Chester (Dr. Farrell, also listed, is a radiologist). It also appears that he has been confined in two hospitals in this district and that he has undergone an operation in one of them, from which he is now recuperating. It does not appear how long he remained under medical care in the hospital in South Carolina nor when he returned to Philadelphia and began treatment with the doctors listed. It is, however, impossible to accept at its face value his contention that the difficulty and expense of getting these witnesses to trial would be such a burden as to make it grossly unjust to him to try the case at a point distant from Philadelphia, in view of the fact that he first selected Chicago as an appropriate and convenient forum. In August, 1953, some three months after the accident, he began a suit against this defendant in the state court there and, although he instituted the present action on September 21, 1953, he maintained the Chicago suit until December 4, 1953.

The motions to transfer will be granted.

Appropriate orders may be submitted.

[fol. 21] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,364

ALEXANDER NORWOOD

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

No. 11,365

JOSEPH F. TUNSTALL

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

No. 11,366

JOHN E. SMALLWOOD

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

PETITION FOR LEAVE TO FILE TYPE WRITTEN PETITION FOR REHEARING—Filed July 30, 1954

To the Honorable the Judges of said Court:

Your petitioners through their counsel, Richter, Lord, & Farage, Esqs., represent that:

1. They desire to file a petition for rehearing and reconsideration of the order of this Court entered July 16, 1954. [fol. 22] The time for filing such petition expires July 31, 1954.

3. It is physically impossible to prepare a printed petition for rehearing in accordance with Rule 33 of the rules of this Court.

Wherefore, your petitioners pray that your Honorable Court enter its order granting leave to file the said petition for rehearing in typewritten form.

Richter, Lord & Farage, by Joseph L. Lord, III.

[fol. 23] File endorsement omitted

In United States Court of Appeals for the Third Circuit

No. 11,364

Alexander Norwood, Petitioner,

vs.

Honorable William H. Kirkpatrick, Chief Judge of the United States District Court for the Eastern District of Pennsylvania

No. 11,365

Joseph F. Tunstall, Petitioner,

vs.

Honorable William H. Kirkpatrick, Chief Judge of the United States District Court for the Eastern District of Pennsylvania

No. 11,366

John E. Smallwood, Petitioner,

vs.

Honorable William H. Kirkpatrick, Chief Judge of the United States District Court for the Eastern District of Pennsylvania

Present: Biggs, Chief Judge and Goodrich and Kalodner, Circuit Judges

Order Granting Leave to File Typed Petition for Rehearing Out of Time—August 6, 1954

Upon consideration of the petition filed July 30, 1954. It is ordered that leave to file typed petition for rehearing out of time be and it is hereby granted.

By the Court. Biggs, Chief Judge.

August 6, 1954

[fol. 24] File endorsement omitted

IN UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,364

ALEXANDER NORWOOD

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

No. 11,365

JOSEH F. TUNSTALL

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

JOHN E. SMALLWOOD

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.

PETITION FOR REHEARING AND RECONSIDERATION—Filed August 6, 1954

To the Honorable the Judges of said Court:

The petitioners in the above entitled cases, by their attorneys, Richter, Lord & Farage, Esqs., respectfully move your Honorable Court to grant a rehearing on the applications for writ of mandamus or prohibition or both, and to reconsider its Order filed thereon on July 16, 1954, denying the said applications, and in support thereof aver that:

1. As a result of an accident occurring in Dillon, South Carolina on April 20, 1953, petitioners commenced three [fol. 25] separate actions in the United States District Court for the Eastern District of Pennsylvania, sub nom: Alexander Norwood v. Atlantic Coast Line Railroad Company, Civil Action No. 15810; Joseph F. Tunstall v. Atlantic Coast Line Railroad Company, Civil Action No. 16174; John F. Smallwood v. Atlantic Coast Line Railroad Company, Civil Action No. 16282.

2. On or about January 12, 1954, defendant filed a motion to dismiss for lack of jurisdiction or in the alternative to transfer the said actions to the United States District Court for the Eastern District of South Carolina, pursuant to 28 U.S.C.A. 1404(a).

3. Service upon the defendant in said actions was properly made and jurisdiction was sustained by the District Court in its opinion filed July 12, 1954, a copy of which is hereto attached, marked Exhibit "A".

4. In connection with the motion to transfer, the United States District Court for the Eastern District of Pennsylvania by the Honorable William H. Kirkpatrick, Chief Judge, concluded that: "The motions to transfer will be granted. Appropriate orders may be submitted."

5. The said opinion of the District Judge was based upon the decision of this Court in *All States Freight, Inc.* v. *Modarelli*, 196 F. 2d 1010 (C.A. 3rd, 1953).

6. The injuries suffered by your petitioners, and plain-[fol. 26] tiffs in the United States District Court, resulted from the derailment of a train upon which they were riding as employees, but in the operation of which they were in no way concerned, so that the petitioners' case is established by the doctrine of res ipsa loquitur. *Jesionouski* v. *Boston & M. R. R.*, 329 U.S. 452, 67 Sup. Ct. 401 (1947).

7. The petitioners Joseph F. Tunstail and John E. Smallwood are residents of Washington, D. C., and the petitioner Alexander Norwood is a resident of Chester, Pennsylvania.

8. All of the petitioners are members of the negro race.

9. Petitioners believe and therefore aver that a jury impaneled in South Carolina would not accord them as fair a trial or as adequate damages as would a jury impaneled in the United States District Court for the Eastern District of Pennsylvania.

10. The greater part of the hospital confinements and treatment in hospitals and by doctors has been in hospitals and by doctors located in Washington, D. C., Chester, Pennsylvania, and Philadelphia, Pennsylvania.

11. The District Judge in his opinion sur motions to transfer recognized that if he were governed by the standards of the doctrine of forum non conveniens, he would be compelled to refuse the motions to transfer, but felt he

was not bound by such standards in view of this Court's decision in *All States Freight, Inc.* v. *Modarelli, supra.*

12. Petitioners are advised by counsel, believe, and re-
[fol. 27] spectfully suggest that the decision of this Court in *All States Freight, Inc.* v. *Modarelli*, supra, is contrary to the decisions of the Supreme Court of the United States and decisions in other Circuits. *Ex parte Collett*, 337 U.S. 55, 69 Sup. Ct. 944 (1949); *Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 379, 73 Sup. Ct. 749 (1953); *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329 (C.A. 2nd, 1950); *Nicol* v. *Koscinski*, 188 F. 2d 537 (C.A. 6th, 1951); *Wiren* v. *Laws*, 194 F. 2d 873 (C.A. Dist. of Columbia, 1951).

13. Petitioners are advised by counsel, believe, and respectfully suggest that the opinion of this Court in *All States Freight, Inc.* v. *Modarelli*, supra, also conflicts with other Circuits in holding that mandamus will not lie to correct an improper action of a District Judge under Section 1404(a).

14. Petitioners respectfully suggest to your Honorable Court that the doctrine and policy announced by this Court in *All States Freight, Inc.* v. *Modarelli*, supra, may well be reviewed and revised, and on the basis thereof there should be granted a rehearing and reconsideration of the Order heretofore entered herein on July 16, 1954.

WHEREFORE, your petitioners respectfully pray your Honorable Court to grant a rehearing on the application for writs of mandamus or prohibition or both, and to reconsider its Order heretofore entered on July 16, 1954.

Richter, Lord & Farage, by Joseph S. Lord III, Attorneys for Petitioners.

[fol. 28] COMMONWEALTH OF PENNSYLVANIA

County of Philadelphia, ss:

Joseph S. Lord, III, being duly sworn according to law, deposes and says that he is a member of the firm of Richter, Lord & Farage, Esqs., of counsel for the petitioners; that

the within petition is filed in good faith and not for any purpose of delay.

Joseph S. Lord, III.

Sworn to and subscribed before me this 30th day of July, 1954. Nancy Shaw, Notary Public. My Commission expires February 2, 1957.

[fols. 29-33] Exhibit "A"—Omitted. Printed Side Page 16, Ante

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[fol. 34] In United States Court of Appeals for the Third Circuit

No. 11,364

Alexander Norwood, Petitioner

vs.

Honorable William H. Kirkpatrick, Chief Judge of the United States District Court for the Eastern District of Pennsylvania

Order Sur Petition for Rehearing—August 24, 1954

Present: Biggs, Chief Judge and Maris, Goodrich, McLaughlin, Kalodner and Staley, Circuit Judges

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court, Biggs, Chief Judge.

Dated: 8/24/54.

[File endorsement omitted.]

[fol. 35] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,365

JOSEPH F. TUNSTALL, Petitioner

vs.

HONORABLE WILLIAM H. KIRKPATRICK, Chief Judge of the United States District Court for the Eastern District of Pennsylvania

ORDER SUR PETITION FOR REHEARING—August 24, 1954

Present: BIGGS, Chief Judge and MARIS, GOODRICH, McLAUGHLIN, KALODNER and STALEY, Circuit Judges

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court, Biggs, Chief Judge.

Dated: 8/24/54.

[File endorsement omitted.]

[fol. 36] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 11,366

JOHN E. SMALLWOOD, Petitioner

vs.

HONORABLE WILLIAM H. KIRKPATRICK, Chief Judge of the United States District Court for the Eastern District of Pennsylvania

ORDER SUR PETITION FOR REHEARING—August 24, 1954

Present: BIGGS, Chief Judge and MARIS, GOODRICH, McLAUGHLIN, KALODNER and STALEY, Circuit Judges

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court, Biggs, Chief Judge.

Dated: 8/24/54.

[File endorsement omitted.]

[fol. 37] Clerk's Certificate to foregoing transcript is omitted in printing.

[fol. 38] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 337

ALEXANDER NORWOOD, JOSEPH F. TUNSTALL, and JOHN E. SMALLWOOD, Petitioners,

vs.

HONORABLE WILLIAM H. KIRKPATRICK, etc.

ORDER ALLOWING CERTIORARI—Filed November 8, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

Term. No. 337

ALEXANDER NORWOOD,
Petitioner,

v.

HONORABLE WILLIAM H. KIRKPATRICK, etc.

JOSEPH F. TUNSTALL,
Petitioner,

v.

HONORABLE WILLIAM H. KIRKPATRICK, etc.

JOHN E. SMALLWOOD,
Petitioner,

v.

HONORABLE WILLIAM H. KIRKPATRICK, etc.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

SUPREME COURT OF THE UNITED STATES.

Term. No.

ALEXANDER NORWOOD,

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v.

HONORABLE WILLIAM H. KIRKPATRICK, etc.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF SUPREME COURT OF THE UNITED STATES:

Alexander Norwood, Joseph F. Tunstall, and John E. Smallwood, by their attorneys, pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Third Circuit entered in the above entitled case on July 16, 1954.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is not reported. A copy of this opinion appears in the Appendix at p. 30. No opinion of the United States Court of Appeals for the Third Circuit was filed.

JURISDICTION.

The order of the Court of Appeals for the Third Circuit was entered on July 16, 1954. A petition for a rehearing was denied on August 24, 1954. The jurisdiction of this Court is invoked under C. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C. A., Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

1. Is not the decision of the United States Court of Appeals for the Third Circuit in this case, which is in conflict with the decisions of this Court and of other Courts of Appeals, incorrect in its holding that Title 28 U. S. C., Section 1404(a), is *not* subject to the restriction of *forum non conveniens?*

2. Is not the decision of the United States Court of Appeals for the Third Circuit in this case, which is in conflict with the decisions of this Court and of other Courts of Appeals, incorrect in its holding that mandamus will not lie to correct an order of a District Court transferring a case to another district?

STATUTES INVOLVED.

Act of June 25, 1948, C. 646, 62 Stat. 937, 28 U. S. C. A. 1404(a), which reads:

> "§1404. *Change of venue*
>
> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."
>
> * * * * * * * * *

Act of April 22, 1908, C. 149 §6, 35 Stat. 66 as amended June 25, 1948, C. 646, §18, 62 Stat. 989, Title 45 U. S. C. A., §56, which reads:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the

residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

STATEMENT OF THE CASE.

These are actions under the Federal Employers' Liability Act, Title 45 U. S. C., Section 51, et seq., to recover damages for serious injuries suffered by the plaintiffs as a result of the derailment of an Atlantic Coast Line train near Dillon, South Carolina. Suits were instituted on behalf of these plaintiffs in the United States District Court for the Eastern District of Pennsylvania which had jurisdiction by virtue of Title 45 U. S. C., Section 56. Defendant filed motions to dismiss, or, in the alternative, to transfer, under Title 28 U. S. C., Section 1404(a), to the United States District Court for the Eastern District of South Carolina, Florence Division. After argument had and affidavits filed, the Honorable William H. Kirkpatrick, on July 12, 1954, filed an opinion denying the motion to dismiss and granting the motion to transfer.

The accident eventuating in the District Court actions was the result of a derailment of a train in whose operation plaintiffs were not concerned. They were confined to, and treated in, various hospitals, and were treated by a number of different doctors. However, the greater number of hospitals in which they were confined and treated, and the greater number of treating physicians, are located either in the Eastern District of Pennsylvania or in Washington, D. C., the latter, of course, being much closer to the Eastern District of Pennsylvania than to Florence, South Carolina.

Petitioner Norwood resides in the Eastern District of Pennsylvania, where he brought suit (Chester, Pa.). Two of the petitioners (Smallwood and Tunstall) reside in Washington, D. C.

It is proposed to transfer their cases to Florence, South Carolina.

All of them are Negroes, who prima facie will fare better in Philadelphia than in Florence, South Carolina.

Your petitioners filed an application in the Court of Appeals for the Third Circuit on July 13, 1954, for a writ of mandamus or prohibition, or both, directed to the District Court Judge. This was denied on July 16, 1954. A petition for a rehearing was denied on August 24, 1954. This petition is filed from the denial of the application for the writ of mandamus or prohibition, or both.

In granting the motion to transfer, the lower Court said:

> "It is quite clear that the Court of Appeals for this Circuit holds that the discretion vested in the District Court to order a transfer under Title 28 U. S. C., Sec. 1404(a) is very much broader than I thought it was when I decided Naughton v. Pennsylvania R. Co., 85 F. Supp. 761. See All States Freight v. Modarelli, 196 F. 2d 1010. *It makes a difference in this case, because if the stringent requirements of the doctrine of forum non conveniens found in the decisions of the Supreme Court prior to the statute are to be applied I would feel that none of the three cases could properly be transferred.* As it is, I think that the balance of convenience in all three cases is sufficiently in favor of the defendant to make the transfer proper." (Emphasis supplied.)

Thus, admittedly, the District Court Judge would have refused the motion to transfer had he not been forced to the contrary by the decision of the Court of Appeals for the Third Circuit, in *All States Freight v. Modarelli*, 196 F. 2d 1010 (C. A. 3, 1952), where that Court said, at page 1011:

"In the first place some district judges are applying section 1404(a) with a limitation imposed by the Supreme Court upon the doctrine of *forum non conveniens* as found in the Gulf Oil and Koster decisions."

"[2] The *forum non conveniens* doctrine is quite different from Section 1404(a). That doctrine involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else. It is quite naturally subject to careful limitation for it not only denies the plaintiff the generally accorded privilege of bringing an action where he chooses, but makes it possible for him to lose out completely, through the running of the statute of limitations in the forum finally deemed appropriate. Section 1404(a) avoids this latter danger. *Its words should be considered for what they say, not with preconceived limitations derived from the forum non conveniens doctrine.*" (Emphasis supplied.)

ARGUMENT.

1. THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT HAS ERRONEOUSLY INTERPRETED TITLE 28 U. S. C., SECTION 1404(a), AND SUCH INTERPRETATION IS IN CONFLICT WITH THE DECISIONS OF EVERY OTHER COURT OF APPEALS AND THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

Admittedly, these cases would not have been transferred if the District Court Judge had been bound by the principles of *forum non conveniens* in deciding the motion to transfer

under Title 28 U. S. C., Section 1404(a). The portion of the opinion of the Honorable District Court Judge which points up the importance of this case, and the necessity of a review by Your Honorable Court, is:

> "It is quite clear that the Court of Appeals for this Circuit holds that the discretion vested in the District Court to order a transfer under Title 28 U. S. C., Sec. 1404(a) is very much broader than I thought it was when I decided Naughton v. Pennsylvania R. Co., 85 F. Supp. 761. See All States Freight v. Modarelli, 196 F. 2nd 1010. *It makes a difference in this case, because if the stringent requirements of the doctrine of forum non conveniens found in the decisions of the Supreme Court prior to the statute are to be applied I would feel that none of the three cases could properly be transferred.* As it is, I think that the balance of convenience in all three cases is sufficiently in favor of the defendant to make the transfer proper." (Emphasis supplied.)

In other words, it is quite clear that the transfer of these cases would have been denied by the District Court Judge if the United States Court of Appeals for the Third Circuit had not held that Section 1404(a) was not subject to the restrictions of *forum non conveniens,* as it did in *All States Freight v. Modarelli,* 196 F. 2d 1010 (C. A. 3, 1953).

In that case, the Third Circuit said, at page 1011:

> "In the first place some district judges are applying Section 1404(a) with a limitation imposed by the Supreme Court upon the doctrine of *forum non conveniens,* as found in the Gulf Oil and Koster decisions.
>
> "[2] The *forum non conveniens* doctrine is quite different from Section 1404(a). That doctrine involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else. It is quite naturally subject to careful limitation for it

> not only denies the plaintiff the generally accorded privilege of bringing an action where he chooses, but makes it possible for him to lose out completely, through the running of the statute of limitations in the forum finally deemed appropriate. Section 1404(a) avoids this latter danger. *Its words should be considered for what they say, not with preconceived limitations derived from the forum non conveniens doctrine.*" (Emphasis supplied.)

It is equally clear that such interpretation by the Court of Appeals for the Third Circuit is in direct conflict with the interpretation of Section 1404(a) by all three other circuits that have considered the question.

These Courts of Appeals have held that Title 28 U. S. C., Section 1404(a) is subject to the limitation of *forum non conveniens.*

In *Ford Motor Co. v. Ryan,* 182 F. 2d 329 (C. A. 2, 1950), Judge Frank said, at page 330:

> "*We think that, by* §1404(a), *Congress did not alter the standard theretofore embodied in the doctrine of forum non conveniens,* despite the fact that that section is applicable to types of actions to which that doctrine did not previously apply. So we read Ex Parte Collett, 337 U. S. 55, 69 S. Ct. 944, 959, 10 A. L. R. 2nd 921, and United States v. National City Lines, 337 U. S. 78, 69 S. Ct. 955, 10 A. L. R. 2d 921. On that basis *these words found in Gulf Oil Corp. v. Gilbert,* 330 U. S. 501, 508, 67 S. Ct. 839, 843, 91 L. Ed. 1055, *still have full vitality: 'But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.'* Those words we interpret to mean (a) that a defendant has the burden of making out a strong case for a transfer and (b) *that the plaintiff's privilege, conferred by statute, of choosing the forum he selected is a factor to be considered* as against the 'convenience' of the witnesses or what otherwise might be the balance

of 'convenience' as between 'the parties'." (Emphasis supplied.)

In *Nicol v. Koscinski*, 188 F. 2d 537 (C. A. 6th, 1951), the Court of Appeals for the 6th Circuit decided that Section 1404(a) was subject to the limitations of the doctrine of *forum non conveniens* and said at p. 537:

> "It is clear that whether the order stands or is set aside, one of the litigants will be inconvenienced, and it became the duty of the district judge to balance inconveniences and to determine upon which litigant the greater hardship would rest, if he granted change of venue, and that determination was subject to the rule that *unless the balance is strongly in favor of the defendant the plaintiff's choice of forum should rarely be disturbed.*" (Emphasis supplied.)

In *Wiren v. Laws*, 194 F. 2d 873 (U. S. C. A. District of Columbia, 1951), the Circuit Court again applied the restriction of *forum non conveniens* to a determination of the question of transfer under Section 1404(a). The court said at p. 874:

> "Those criteria, applied to the §1404(a) situation, have been set out by Judge Frank in Ford Motor Co. v. Ryan, 2 Cir., 1950, 182 F. 2d 329, 330. After pointing out that the question is 'whether the judge abused his discretion,' he continues: '* * * by §1404(a), Congress did not alter the standard theretofore embodied in the doctrine of *forum non conveniens*, despite the fact that that section is applicable to types of actions to which that doctrine did not previously apply. So we read Ex parte Collett, 337 U. S. 55, 69 S. Ct. 944, 959, [93 L. Ed. 1207] 10 A. L. R. 2d 921, and United States v. National City Lines, 337 U. S. 78, 69 S. Ct. 955, [93 L. Ed.] 1226, 10 A. L. R. 2d 921. On that basis, these words found in Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 508,

67 S. Ct. 839, 843, 91 L. Ed. 1055, still have full vitality: 'But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. 'Those words we interpret to mean (a) that a defendant has the burden of making out a strong case for a transfer and (b) that the plaintiff's privilege, conferred by statute, of choosing the forum he selected is a factor to be considered as against the 'convenience' of the witnesses or what otherwise might be the balance of 'convenience' as between 'the parties'."

Indeed, the Third Circuit itself recognized that many of the District Courts and Courts of Appeals were applying the limitations of *forum non conveniens* to Section 1404(a), and that it was in conflict with these other courts. It said in *All States Freight v. Modarelli*, 196 F. 2d 1010, at p. 1011:

> "In the first place some district judges are applying section 1404(a) with a limitation imposed by the Supreme Court upon the doctrine of *forum non conveniens* as found in the Gulf Oil and Koster decisions."

and at p. 1012:

> "* * * *We realize that the view we express is not the one which some of our judicial brethren are following with regard to this statute.*" (Emphasis supplied.)

The same District Court Judge as is involved in these cases also decided the case of *Naughton v. Pennsylvania R. Co.*, 85 F. Supp. 761 (U. S. D. C. E. D. Pa., 1949). He there held that Section 1404(a) was subject to the limitations of the doctrine of *forum non conveniens* and said (pp. 763-764):

> "It is my opinion that, whatever inconvenience may result to the defendant from trying these cases in Philadelphia, it is not so great as to allow the Court, under the well established limitations of the doctrine forum

non conveniens, to transfer the cases to Pittsburgh; nor do I think that the interests of justice imperatively require it if balanced against the importance of allowing the plaintiff freedom of choice among forums of unquestioned venue. After all, Section 6 of the Federal Employers' Liability Act was designed to give the injured employee a wide choice of forum in which to bring his action. It has not been repealed and the underlying policy remains and should be carried out whenever possible unless serious inconvenience or injustice to the defendant will result. *The view contended for by the defendant would come close to making Section 1404(a) a venue statute, under which the court, after striking a nice balance of conveniences, would be bound to limit the plaintiff to a single jurisdiction.* If that had been the purpose, the statute would have directed the courts to make transfers to the most convenient jurisdiction—a very different question from that involved in the doctrine of forum non conveniens.

"These, I think, are the principles which must guide my discretion. I have very little doubt that it was the intent of Congress to do more than permit the transfer of cases which otherwise, under the doctrine forum non conveniens, would have been dismissed *and that it was not intended to abolish or extend the boundaries within which the Court's discretion to refuse jurisdiction could be exercised.* In Ex parte Collett, supra, the Court pointed out that when Section 1404(a) first appeared in the Second Draft of the Code adopted May, 1945, it was accompanied by a reviser's note which recited that '"Subsection (a) is new. It was drafted in accordance with a memorandum of Mar. 7, 1945, from the author of Moore's Federal Practice, stating that recognition should be given the doctrine of forum non conveniens" * * * And the reviser's notes were before the Congress at every subsequent legislative step.' The Court said, 'From the start, §1404(a) remained the

same, and the reference in the note to a Federal Employer's Liability Act case as showing the need for permitting the application of forum non conveniens remained unchanged.' In United States v. National City Lines, Inc., 337 U. S. 78, 69 S. Ct. 955, 956, 959, an opinion handed down on the same day as the Collett case, supra, the Court referred to 'Ex parte Collett, 337 U. S. 55, 69 S. Ct. 944, 959, and Kilpatrick v. Texas & Pacific R. Co., 337 U. S. 75, 69 S. Ct. 953, 959, in which we held that actions under the Federal Employers' Liability Act, 45 U. S. C. A. §51, et seq., were now subject to the doctrine of forum non conveniens.'

Besides, although it is quite true that the new Judicial Code was a revision as well as a codification and that it made some important changes in the law, it is also true that it was not thought to be desirable nor intended to make sweeping changes. In committing to the court's discretion to transfer cases, it is more in harmony with the expressed purpose of the framers of the Code to have that discretion controlled by well recognized principles than to unsettle the whole law on the subject and leave it wide open for the courts to evolve entirely new rules." (Emphasis supplied.)

The decision by the Third Circuit in *All States Freight Co. v. Modarelli*, supra, is without foundation in law, either in previously decided cases by your Honorable Court, or in the legislative history of Title 28 U. S. C., Section 1404(a). Moreover, your Honorable Court has often clearly indicated that Section 1404(a) is nothing more than an application of the doctrine of *forum non conveniens*.

In *Ex Parte Collett*, 337 U. S. 55, 69 S. Ct. 944 (1949), your Honorable Court had before it the question of whether Section 1404(a) was applicable to Federal Employers' Liability cases. Chief Justice Vinson, in stating the question that was then before the Court, said, at page 56 (69 S. Ct., p. 945):

> "In this case we must decide whether the venue provisions of the Judicial Code *render applicable the doctrine of forum non conveniens to actions under the Federal Employers' Liability Act.*" (Emphasis supplied.)

This Court in the same case said at pages 57 and 58 (69 S. Ct., p. 946):

> "The reviser's notes, which accompany each section of the Code, here read as follows: '*Subsection (a) was drafted in accordance with the doctrine of forum non conveniens*, permitting transfer to a more convenient forum even though the venue is proper. As an example of the need of such a provision, see Baltimore & Ohio R. Co. v. Kepner, 1941, 314 U. S. 44, 62 S. Ct. 6, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the Court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so.' The precise issue before us is whether, despite these expressions, the law remains unchanged. Petitioner so contends." (Emphasis supplied.)

It is therefore apparent that the revisers of the Judicial Code clearly intended to make the doctrine of *forum non conveniens* applicable and nothing more. The whole tone and tenor of the opinion of *Ex parte Collett* is one of a discussion of *forum non conveniens*, and does not, in any fashion, support the interpretation of Section 1404(a) which the Third Circuit has now decided to be the correct one. This Court said, in 337 U. S., at pages 60 and 61 (69 S. Ct. 947):

> "The inapplicability of *forum non conveniens* to Liability Act suits derives from the Kepner decision. And there this Court expressly stated that 'If it is deemed

unjust, the remedy is legislative * * *.' 314 U. S. at page 54, 62 S. Ct. at page 10 86 L. Ed. 28. That opinion discusses §6 of the Liat ity Act, to be sure, but this Court did not and could x suggest that the legislative answer had necessarily t be addressed to that section. Since the words selecte by Congress for §6 denote nothing, one way or the other, respecting *forum non conveniens*, there was no ccasion to repeal that section, expressly or impliedly; Congress chose to remove its judicial gloss via anothe statute. Discussion of the law of implied repeal is therefore, irrelevant."

and at page 65 (69 S. Ct., pag 949):

"His argument is obviously based not on the actual legislative history of §1404(a), but on necessarily vague speculation as to what Co gress might have done had it fully realized that *forum non conveniens was henceforth to be applicable in Federal Employers' Liability Act suits.*" (Emphasis su; plied.)

and at page 68 (69 S. Ct., page 951):

"It was drafted in accordance with a memorandum of Mar. 7, 1945, from the author of Moore's Federal Practice, stating that *recognition should be given the doctrine of forum non conveniens.* * * *" (Emphasis supplied.)

and, at page 71 (69 S. Ct., page 952):

"From the start, Section 1404(a) remained the same, and the reference in the note to a Federal Employers' Liability Act case as showing the need for permitting the application of *forum non conveniens* remained unchanged."

Furthermore, as recently as April of 1953, your Honorable Court, in *Pope v. Atlantic Coast Line R. Co.*, 345 U. S. 379,

73 S. Ct. 749 (1953), reiterated its holding in *Ex Parte Collett*, at page 383 (73 S. Ct., page 751):

> "We have heretofore held that §1404(a) makes *the doctrine of forum non conveniens applicable to Federal Employers' Liability Act cases* brought in federal courts and provides for the transfer of such actions to a more convenient forum. Ex parte Collett, 1949, 337 U. S. 55, 69 S. Ct. 944, 959, 93 L. Ed. 1207." (Emphasis supplied.)

In the same opinion, this Court quoted, in Footnote 10, page 385, the Reviser's Notes, which said:

> "Subsection (a) was drafted *in accordance with the doctrine of forum non conveniens*, permitting transfer to a more convenient forum, even though the venue is proper." (Emphasis supplied.)

Thus, this Court has at all times regarded Section 1404(a) as synonymous with the doctrine of *forum non conveniens*, and, therefore, subject to the same restrictions as are found under the doctrine of *forum non conveniens*.

It is undoubtedly true that this Court, the Second Circuit, the Sixth Circuit, and the Court of Appeals for the District of Columbia have correctly interpreted §1404(a) as subject to the same limitations as are found in the doctrine of *forum non conveniens*. Whatever may be said of other types of actions, employees bringing suit under the Federal Employers' Liability Act were given a "substantial right" to select their forum by Section 6 of the Federal Employers' Liability Act. Indeed, your Honorable Court, in *Boyd vs. Grand Trunk Western R. Co.*, 338 U. S. 263, 70 S. Ct. 26 (1949), held that the venue rights afforded by Section 6 of the Federal Employers' Liability Act were so strong that they could not be contracted away and said (p. 266) (70 S. Ct. 28):

> "And nothing in Ex parte Collett, 1949, 337 U. S. 55, 69 S. Ct. 944, affects the initial choice of venue afforded

Liability Act plaintiffs. We state expressly that the section of the Judicial Code there involved, 28 U. S. C. §1404(a), 28 U. S. C. A. §1404(a), *'does not limit or otherwise modify any right granted in §6 of the Liability Act or elsewhere to bring suit in a particular district.* An action may still be brought in any court, state or federal, in which it might have been brought previously.' 337 U. S. at page 60, 69 S. Ct. at page 947.

"The right to select the forum granted in Section 6 is a *substantial right.*"

The interpretation which the Third Circuit has given Section 1404(a) not only limits and modifies the right granted in Section 6 of the Federal Employers' Liability Act, but destroys the "substantial right" given to such plaintiffs by such Section. The decision in *All States Freight Co. v. Modarelli,* supra, is a mandate to district court judges to refuse to recognize the plaintiff's choice of forum as a factor. Judge Frank, in *Ford Motor Co. v. Ryan,* 182 F. 2d 329 (C. A. 2, 1950), said, at page 330:

"* * * We think that, by §1404(a), Congress did not alter the standard theretofore embodied in the doctrine of forum non conveniens, despite the fact that that section is applicable to types of actions to which that doctrine did not previously apply. So we read Ex Parte Collett, 337 U. S. 55, 69 S. Ct. 944, 959, 10 A. L. R. 2d 921, and United States v. National City Lines, 337 U. S. 78, 69 S. Ct. 955, 10 A. L. R. 2d 921. On that basis, these words found in Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 508, 67 S. Ct. 839, 843, 91 L. Ed. 1055, still have full vitality: 'But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.' Those words we interpret to mean (a) that a defendant has the burden of making out a strong case for a transfer and (b) *that the plaintiff's privilege, conferred by statute, of choosing the forum he selected is a factor to be considered as against*

the 'convenience' of the witnesses or what otherwise might be the balance of 'convenience' as between 'the parties'." (Emphasis supplied.)

Compare, also, the language of Judge Learned Hand, in the same case, where he said, at p. 332:

"I wish to put my vote solely upon the ground that §15 of Title 15 U. S. C. A. gives to a plaintiff a privilege which a defendant must overcome by more than a bare balance of convenience between the two forums. If I thought that we had before us an unweighted choice between New York and Detroit, based upon that consideration, I should choose Detroit; indeed, I should think it a clear abuse of discretion to hold otherwise. *However, as I understand it, the privilege granted by §15 still counts in the scale;* a defendant must do more than show that the transfer will on the whole make the trial more convenient; it must make the trial markedly more convenient." (Emphasis supplied.)

It is this language which the Third Circuit rejects in the case of *All States Freight Co. vs. Modarelli,* supra. If the "plaintiff's privilege, conferred by statute, of choosing the forum he selected" is rejected, as "a factor to be considered as against the convenience of witnesses or what otherwise might be the balance of convenience as between the parties", there is nothing left of the plaintiff's venue privileges under Section 6 of the Federal Employers' Liability Act.

The decision in *All States Freight Co. vs. Modarelli,* supra, compels district court judges to choose *the most* convenient forum and transfer, upon motion, the case to that forum. Since there can be only one *most* convenient forum, this interpretation undoubtedly destroys all rights given to plaintiffs by Section 6 of the Federal Employers' Liability Act,[1]

[1] If it be thought that the forum for the trial of a case is of little practical importance in the administration of justice, it need only be pointed out that the three seriously injured petitioners involved in this case are negroes, who must, if the transfer is granted, try their cases before a jury in South Carolina.

and forces them to litigate their cause, not in the "district of the residence of the defendant in which the cause of action arose, or in which the defendant is doing business"—the words of Section 6—but in only *one place: the* most convenient forum. As examples of this interpretation of the effect of the *Modarelli* decision, we point to *Paragon-Revolute Corp. v. C. F. Pease Co.*, 120 F. Supp. 488 (U. S. D. C., D. Del., 1954); *General Felt Products Co. v. Allen Industries, Inc.*, 120 F. Supp. 491 (U. S. D. C., D. Del., 1954), where Judge Leahy, bound by the *Modarelli* decision, considered numerous forums and chose *the* most convenient one. Such interpretation is directly contrary to your Honorable Court's decisions in *Ex Parte Collett*, supra; *Boyd v. Grand Trunk Western R. Co.*, supra; and *Pope v. Atlantic Coast Line R. Co.*, supra. In *Pope v. Atlantic Coast Line*, supra, this Court said, at pages 386, 387 (73 S. Ct. at page 753):

> "Congress might have gone further; it might have vested state courts with the power asserted here. In fact, the same Congress which enacted §1404(a) *refused to enact a bill which would have amended §6 of the Federal Employers' Liability Act by limiting the employee's choice of venue to the place of his injury or to the place of his residence.*
>
> "This proposed amendment—the Jennings Bill—focused Congress' attention on the decisions of this Court in both the Miles and the Kepner cases. The broad question—involving many policy considerations—of whether venue should be more narrowly restricted, was reopened; cogent arguments—both pro and con—were restated. Proponents of the amendment asserted that, as a result of the Miles and Kepner decisions, injured employees were left free to abuse their venue rights under §6 and 'harass' their employers in distant forums without restrictions. They insisted that these abuses be curtailed.
>
> "These arguments prevailed in the House which

passed the Jennings Bill, but the proposed amendment died in the Senate Judiciary Committee, and §6 of the Federal Employers' Liability Act was left just as this Court had construed it."

Indeed, the former Governor of California and now Chief Justice of this Court spoke regarding an effort of the California Legislature, in 1953, to incorporate a doctrine of *forum non conveniens* into the law of that state. (Senate Bill No. 789.) In vetoing such bill, he said:

> " 'If we are to whittle away in this manner the benefits conferred by the Federal Employers' Liability Act, it would soon lose *its national uniformity and could at least substantially weaken the purposes for which the act was originally designated.* I am not advised that other states have enacted such legislation. The fact that this act has been in effect since 1908 without similar legislation being enacted in other states would indicate a nationwide appreciation of the desirability for this uniformity. At all events if any of the provisions of the act result in a denial of justice to either plaintiffs or defendants, the situation could be remedied nationwide by a simple act of Congress.' "

If Section 6 is to continue to have the vitality attributed to it by your Honorable Court, in consistent and unwavering decisions, the interpretations of Section 1404(a) by the Third Circuit in *All States Freight v. Modarelli*, supra, cannot be allowed to stand.

There can be no doubt of the importance of this case. In *Ex Parte Collett*, supra, your Honorable Court said, at page 57 (69 S. Ct., page 945):

> "Since that issue seemed of importance in the administration of justice, we assigned the case for hearing on the motion."

and footnoted that statement as follows (footnote 4):

> "At least five district court decisions dealing with the relationship of §1404(a) to FELA suits have been reported. Four have held that the section is applicable. Hayes v. Chicago, R. I. & P. R. Co. (and seven other cases), D. C. 1948, 79 F. Supp. 821; White v. Thompson, D. C. 1948, 80 F. Supp. 411; Nunn v. Chicago, St. P. & P. R. Co., D. C. 1948, 80 F. Supp. 745; Scott v. New York Central R. Co., D. C. 1948, 81 F. Supp. 815; cf. Brainard v. Atcheson, T. & S. F. R. Co., D. C. 1948, 81 F. Supp. 211; Perry v. Atcheson, T. & S. F. R. Co., D. C. 1948, 82 F. Supp. 912 (in both, motion to transfer denied, in exercise of 'discretionary powers'); Chaffin v. Chesapeake & O. R. Co., D. C. 1948, 80 F. Supp. 957; Richer v. Chicago, R. I. & P. R. Co., D. C. 1948, 80 F. Supp. 971. One reported decision has held that the Code section is inapplicable to such suits. Pascarella v. New York Central R. Co., D. C. 1948, 81 F. Supp. 95."

Using this as a guide post for the determination of the importance of the issue, we find that practically every volume of the Federal Supplement contains at least one, and usually two or three, cases involving the application of Section 1404(a). Almost without exception, these cases quote and cite with approval the case of *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 67 S. Ct. 839 (1947). Our research discloses that this leading case on the principles of *forum non conveniens* has been relied upon in deciding motions under Section 1404(a) no less than twenty times since Volume 97 of the Federal Supplement was published.

The following cases have applied the restrictions of the doctrine of *forum non conveniens* to questions arising under Section 1404(a):

> *Rhodes v. Barnett*, 117 F. Supp. 312 (U. S. D. C. S. D. N. Y. 1953);
>
> *Lehn & Fink Products Corp. v. Milner Products Co.*, 117 F. Supp. 320 (U. S. D. C. S. D. N. Y. 1953);

United States v. Switzer Bros., 115 F. Supp. 49 (U. S. D. C. N. D. Calif., S. D. 1953);
Duffy v. United States, 114 F. Supp. 881 (U. S. D. C. S. D. N. Y. 1953);
Faucette v. Lykes Bros. S. S. Co., 110 F. Supp. 287 (U. S. D. C. S. D. N. Y. 1953);
Markantonatos v. Maryland Drydock Co., 110 F. Supp. 862 (U. S. D. C. S. D. N. Y. 1953);
Wheeler v. Societe Nationale Des Chemins, Etc., 108 F. Supp. 652 (U. S. D. C. S. D. N. Y. 1952);
Ronson Art Metal Works v. Brown & Bigelow, 105 F. Supp. 169 (U. S. D. C. S. D. N. Y. 1952);
Jenkins v. Wilson Freight Forwarding Co., 104 F. Supp. 422 (U. S. D. C. S. D. N. Y. 1952);
Lynch v. Luckenbach S. S. Co., In., 104 F. Supp. 494 (U. S. D. C. S. D. N. Y. 1952);
McDaniel v. Drotman, 103 F. Supp. 643 (U. S. D. C. W. D. Ky. 1952);
Oritz v. Union Oil Co. of California, 102 F. Supp. 492 (U. S. D. C. S. D. N. Y. 1952);
Reade Shirts v. Commonwealth Ins. Co. of New York, 102 F. Supp. 941 (U. S. D. C. S. D. N. Y. 1952);
Federal Electric Products Co. v. Frank Adam Electric Co., 100 F. Supp. 8 (U. S. D. C. S. D. N. Y. 1951);
Nicol v. J. C. Penny Co., 97 F. Supp. 83 (U. S. D. C. E. D. Mich. 1951);
Mazinski v. Dight, 99 F. Supp. 192 (U. S. D. C. W. D. Pa. 1951);
Webster-Chicago Corp. v. Minneapolis-Honeywell Reg. Co., 99 F. Supp. 503 (U. S. D. C. D. Del. 1951);
Goodman v. Southern Ry. Co., 99 F. Supp. 852 (U. S. D. C. S. D. N. Y. 1951).

In fact, we have been able to find only two District Court decisions which reject the application of the principles of

Gulf Oil Corp. v. Gilbert, supra, and these are two decisions by a United States District Court within the Third Circuit. They are in the United States District Court for Delaware after the decision in *All States Freight v. Modarelli*, supra. They are *Paragon-Revolute Corp. v. C. F. Pease Co.*, 120 F. Supp. 488 (1954), and *General Felt Products Co. v. Allen Industries*, 120 F. Supp. 491 (1954).

Not only have the District Court Judges used the principles and applied the limitations of *forum non conveniens*, but at least three Justices of your Honorable Court have directly recognized that Section 1404(a) is a *forum non conveniens* statute, and that the principles of *Gulf Oil Corp. v. Gilbert*, supra, are applicable. In *Wells v. Simonds Abrasive Co.*, 345 U. S. 514, 73 S. Ct. 856 (1953), in a dissenting opinion, Justice Jackson, with whom Justices Black and Minton joined, said, at page 522 (S. Ct. p. 860):

> "28 U. S. C. §1404(a) authorizes certain transfers of any civil action from state to state for the convenience of witnesses or of parties, or in the interests of justice. The purpose was to adopt for federal courts the principles of *forum non conveniens*. Ex parte Collett, 337 U. S. 55, 69 S. Ct. 944 L. Ed. 1207. These are broad and imprecise and involve such considerations as the state of the court's docket. Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 67 S. Ct. 839, 91 L. Ed. 1055."

The majority opinion did not discuss this matter nor disagree in any respect with this statement by the dissenters.

To allow the decision of *All States Freight v. Modarelli*, supra, to stand unreviewed by this Court would leave the important Third Circuit standing alone in its interpretation of Section 1404(a), and would compel the District Court Judges in that Circuit to decide questions under Section 1404(a) on bases different from the entire remainder of the United States Courts.

For these reasons, certiorari should be allowed, and the decisions of the Court of Appeals for the Third Circuit

should be conformed to the decisions of other circuits, the intention of Congress in enacting Section 1404(a), and the decisions of this Court interpreting it.

II. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF THE SUPREME COURT AND OTHER COURTS OF APPEALS HOLDING THAT MANDAMUS WILL LIE TO CORRECT AN ORDER OF THE DISTRICT COURT, EITHER DENYING OR GRANTING TRANSFER OF THE CASE TO ANOTHER DISTRICT UNDER TITLE 28 U. S. C., SECTION 1404(a).

The question here raised is one of extreme importance to the administration of justice. A holding that mandamus will not lie to correct an order of the District Court, either transferring or refusing to transfer under Title 28 U. S. C., Section 1404(a), deprives the losing party of any effective right to correct a decision of the District Court, no matter how egregious its error may be. The frequency of cases involving the application of Section 1404(a) has already been adverted to in a previous portion of this brief.[2]

Five Courts of Appeals have held that mandamus will lie to correct such orders.

Ford Motor Co. v. Ryan, 182 F. 2d 329 (C. A. 2, 1950), certiorari denied 340 U. S. 953, 71 S. Ct. 572;

Atlantic Coast Line R. Co. v. Davis, 185 F. 2d 766 (C. A. 5, 1950);

Chicago R. I. & P. R. Co. v. Igoe, 212 F. 2d 378 (C. A. 7, 1954);

Shapiro v. Bonanza Hotel Co., 185 F. 2d 777 (C. A. 9, 1950);

Wiren v. Laws, 194 F. 2d 873 (Dist. of Columbia, 1951).

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[2] Pages 19-22, supra.

Two Courts of Appeals have held that mandamus does not lie to correct a Section 1404(a) order.

> *Carr v. Donohoe*, 301 F. 2d 426 (C. A. 8, 1953);
> *All States Freight Co. v. Modarelli*, 196 F. 2d 1010 (C. A. 3, 1952).

Thus, there is a demonstrable conflict among the circuits on the important question here involved. The factors arising in favor of a decision that mandamus does lie are:

(a) The losing party in the District Court has no other remedy available.

It is well established, without exception, that an order granting or denying transfer is not appealable. *Ford Motor Co. v. Ryan*, supra; *Jiffy Lubricator Co. v. Stewart-Warner Corp.*, 177 F. 2d 360 (C. A. 4, 1949). However, some courts have treated appeals as petitions for mandamus in cases of this sort. *Ford Motor Co. v. Ryan*, supra; *Shapiro v. Bonanza Hotel Co.*, 185 F. 2d 777 (C. A. 9, 1950). Thus, without the right to have a review of the District Court's decision, the losing party is forced to go to or stay in the forum where he does not desire to try his case. Of course, after the trial of the case, upon an adverse ruling, the party has the right to raise the question of transfer (or non-transfer) in the Court of Appeals in which he now finds himself. However, it needs no citation of authority to demonstrate the practical situation of a losing party without any possible re-dress. For in this instance the losing party can never show any prejudice to the trial of his case because of the erroneous ruling on the transfer motion.

This reason for holding that a petition for mandamus would lie was given by Judge Frank in *Ford Motor Co. v. Ryan*, supra, where he said p. 330:

> "Judge Swan thinks we have no power to grant a writ of mandamus. Judge Hand and I think this the

kind of interlocutory order with which this court can properly deal by way of such a writ, since should petitioners—the defendants—finally lose on the merits below, any error in the interlocutory order would probably be incorrectible on appeal, for petitioners could hardly show that a different result would have been reached had the suit been transferred. Nor, should petitioners win on the merits below, could they collect as costs the additional expenses to them, if any, due to the court's failure to order the transfer. We recognize that the dividing line is by no means entirely clear between the power of this court and its lack of power to issue the writ. But we think this a sufficiently 'extraordinary cause' to empower us to do so, if the district judge erred."

It was also relied upon in *Chicago R. I. & P. R. Co. v. Igoe,* 212 F. 2d 378 (C. A. 7, 1954), where that Court said, p. 381:

"While a ruling on a motion under Section 1404(a) to transfer is not an appealable order, Ford Motor Co. v. Ryan, supra; Jiffy Lubricator Co. v. Stewart-Warner Corp., 4 Cir., 177 F. 2d 360, *it is the type of order which may, absent the power of this court to correct it in any case, give rise to judicially sanctioned irreparable procedural injury.*" (Emphasis supplied.)

In addition, should the losing party happen to be one against whom an erroneous transfer order had been granted, it is at least doubtful as to whether or not the Court of Appeals for the district in which he is forced to try his case has the power to return it to the original forum.

Atlantic Coast Line R. Co. v. Davis, 185 F. 2d 770 (C. A. 5, 1950).

(b) Your Honorable Court has impliedly recognized the power of the Courts of Appeals to grant writs for man-

damus in order to review questions arising in the interpretation of §1404(a).

> *Ex Parte Collett*, 337 U. S. 55, 69 S. Ct. 944 (1949); *Kilpatrick v. Texas & P. Ry. Co.*, 337 U. S. 75, 69 S. Ct. 953 (1949); and *United States v. National City Lines*, 337 U. S. 78, 69 S. Ct. 955 (1949) were the first cases interpreting Section 1404(a). At least two of the reviews in those cases were by a petition for mandamus. In *Ex Parte Collett* the Court said, p. 57 (S. Ct., p. 945):
>
> "Petitioner then filed directly in this Court a 'motion for leave to file petition for order to show cause why writs of mandamus [against the court below] and prohibition [against the Kentucky District Court] should not issue, and petition for same'." * * * "Since that issue seemed of importance in the administration of justice, we assign the case for hearing on the motion."
>
> In *Kilpatrick v. Texas & P. Ry. Co.*, supra, this Court said, p. 77 (S. Ct., p. 955):
>
> "To nullify this order, petitioner moved this Court for leave to file a petition for a writ of certiorari or a writ of mandamus or any appropriate relief. We assigned the case for hearing on the motion for leave to file."

(c) In cases such as these arising under the Federal Employers' Liability Act, the employee's right to choice of venue could be arbitrarily and erroneously destroyed by a district court without any right of redress.

> We have already pointed out that if it be held that mandamus does not lie to correct an order of the district court granting a transfer, all persons so aggrieved have no effective remedy.
>
> With respect to individuals covered by the Federal Employers' Liability Act, such as these petitioners, a special venue statute, Section 6 of the Federal Em-

ployers' Liability Act, gave them a substantial right to select the forum in which they wish the case to be tried.

In *Boyd v. Grand Trunk Western R. Co.*, 70 S. Ct. 26, 338 U. S. 263 (1949), this Court said, at page :

"The right to select the forum granted in §6 is a *substantial right.*"

Nothing remains of this substantial right if a District Court Judge may with impunity transfer a case and if the plaintiff has no right to a mandamus action to correct such action. The action of the District Court Judge can be arbitrary and capricious. He can refuse to consider the factors outlined in Title 28, U. S. C. 1404(a) and the plaintiff is left without any effective remedy. Indeed, important questions arising in the administration of Title 28, U. S. C. 1404(a) can never be decided by the federal appellate courts if such situation is allowed to exist.

Most especially is the holding that mandamus will not lie an interference with the substantial right granted in Section 6 when such holding is coupled with the decision in *All States Freight Co. v. Modarelli,* supra, to the effect that the plaintiff's choice of forum is of no moment, and that this and the other factors of *forum non conveniens* do not apply when interpreting Title 28 U. S. C. 1404(a).

CONCLUSION.

Section 6 of the Federal Employers' Liability Act was originally written by the Congress of the United States, and broadened at its subsequent sessions to its present all-inclusive status. We are certain that the Congress did not write this section of the Act for naught. It must have done so only because it was aware of the need to provide injured railroad employees with more than one forum in which to try their cases. Indeed, Congress recognized that

railroad employees must be allowed to try their cases at considerable distances both from their homes or from the locale where they suffered their injuries and therefore provided this multiplicity of venue. The statute was written for the benefit of the employees—not for the benefit of the carrier. Congress has stoutly resisted efforts made at virtually every session since then to undermine Section 6. It has sustained its position, notwithstanding the organized opposition from various directions.

In the same session of Congress in which Section 1404(a) became enacted in law in Title 28 of the Judicial Code, Congress refused to adopt the Jennings Bill, which attempted to destroy the venue rights of Section 6. To allow, now, judicial destruction of a right legislatively created is to violate basic constitutional principles of law. It is to allow the judiciary to become the law-making body. It is to allow the achievement by indirection that which could not be achieved by direct action. It is to allow a subtle new solvent to dissolve, and, literally, to destroy, a basic, vital, important right of injured railroad employees. And this, without any right to the injured party to secure a correction of the District Court's decision by mandamus.

Whatever may ultimately be the course of other forms of litigation under Section 1404(a), we respectfully submit that this Section cannot have the effect of completely destroying special venue rights when created by Congress for special classes of persons. When special venue privileges were granted to railroaders, seamen and others, those privileges were granted intentionally. Only the grantor has the power to withdraw those rights.

Thus, this Court should grant certiorari to review the two questions here involved, which are extremely important in the administration of justice, and both of which have been decided differently by the Courts of Appeals.

Title 28, U. S. C. 1404(a) has possible application to every action filed in the Federal Courts. Its application, and the review of decisions by the District Court judges under such

section requires clarification if the administration of it is to be uniform, orderly, and fair to all parties.

Respectfully submitted,

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APPENDIX.

IN THE
UNITED STATES DISTRICT COURT.
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

(Filed July 12, 1954.)

ALEXANDER NORWOOD v. ATLANTIC COAST LINE RAILROAD COMPANY.	Civil Action. No. 15810.
JOSEPH F. TUNSTALL v. ATLANTIC COAST LINE RAILROAD COMPANY.	Civil Action. No. 16174.
JOHN E. SMALLWOOD v. ATLANTIC COAST LINE RAILROAD COMPANY.	Civil Action. No. 16282.

SUR MOTIONS TO DISMISS OR TRANSFER.

Before: KIRKPATRICK, Ch. J.

THE MOTION TO DISMISS.

The defendant's activities in this District as disclosed by the affidavits are exactly the same as those in Robinson v. Atlantic Coast Line R. R. Co., Civil Action No. 13711, 1953 (in which I held this defendant was not subject to venue jurisdiction in the Eastern District of Pennsylvania), but the two cases are readily distinguishable. The Robinson case was a diversity case and, following the reasoning of Partin v. Michaels Art Bronze Co., 202 F. 2d 541, I held that inasmuch as the Pennsylvania Courts did not regard this corporation as subject to their jurisdiction (Law v. Atlantic Coast Line R. R. Co., 367 Pa. 170), it could not be sued in a diversity action in a federal court sitting in Pennsylvania. This case arises under the Federal Employer's Liability Act, and whether the defendant is subject to process here depends entirely upon whether it is doing business here, as that term is defined by the federal courts.

It is clear that federal courts, applying that Act, require less by way of business activities within the district to constitute doing business than the Pennsylvania court did in the Law case. As Judge Grim pointed out in Moore v. Atlantic Coast Line R. Co., 98 F. Supp. 375, 380, "Jurisdiction has been regularly sustained in 'solicitation plus' cases, that is, cases where foreign railroad corporations have engaged in business activities additional to the 'mere solicitation' of interstate business." In the present case I am of the opinion that the activities of the defendant in connection with its dining car service, fully discussed in the Law case, supplied the "plus" and I, therefore, hold that the defendant is subject to venue jurisdiction in this district.

The motions to dismiss are, therefore, denied.

THE MOTION TO TRANSFER.

It is quite clear that the Court of Appeals for this Circuit holds that the discretion vested in the District Court to order a transfer under Title 28 U. S. C., Sec. 1404(a), is very much broader than I thought it was when I decided Naughton v. Pennsylvania R. Co., 85 F. Supp. 761. See All States Freight v. Modarelli, 196 F. 2d 1010. It makes a difference in this case, because if the stringent requirements of the doctrine of forum non conveniens found in the decisions of the Supreme Court prior to the statute are to be applied I would feel that none of the three cases could properly be transferred. As it is, I think that the balance of convenience in all three cases is sufficiently in favor of the defendant to make the transfer proper.

The plaintiffs are all dining car employees of the defendant and were injured as a result of the derailment of one of the defendant's trains near Dillon, S. C.

The proposed witnesses whose names have been supplied in affidavits by both sides fall into two classes—those who will be called in connection with the issue of liability, and medical witnesses whose testimony will have to do with the nature, extent and probable duration of the plaintiffs' injuries and disabilities.

As to the liability witnesses, the plaintiffs' argument against the transfer seems to proceed on the theory, offered in an affidavit filed by the plaintiffs' attorney, that "there can be little question of liability, and witnesses for the defendant on the liability question are not necessary." Of course, if this were so there would be very little reason to order the transfer, in view of the plaintiffs' choice of forum. However, the defendant asserts that it intends to contest this issue vigorouly and lists some 24 fact witnesses whom, it says, will have to be called upon the point. From the summaries of what these witnesses are expected to testify

to and from a consideration of the kind of defense testimony needed to disprove negligence in derailment cases, I am satisfied that a good many, if not all, of the witnesses will have to be brought to Philadelphia at considerable expense. I certainly cannot at this point decide, as the plaintiffs want me to, that the defendant has no case and, therefore, will not need any witnesses.

The plaintiffs have listed some 48 passengers as possible witnesses but do not say how many they propose to call or what any of them can testify to other than the speed of the train, and it is difficult to see how more than two or three would be necessary.

On the medical side, the defendant proposes to call about a dozen doctors and hospital employees who have knowledge of the condition of the plaintiffs when they were treated at hospitals in South Carolina immediately after the accident. I am quite sure that very few of these will be needed, particularly in view of the fact that the plaintiffs have agreed to stipulate as to the authenticity of the hospital records.

There are, of course, other considerations. On the one hand, I have not overlooked the weight to be given to the plaintiffs' choice of a forum. On the other hand, the condition of the court calendar makes it fairly certain that the cases cannot be tried in this district for at least two years.

Smallwood and Tunstall are residents of Washington, D. C. Since their removal from the South Carolina hospital they have been treated and observed by physicians in Washington and Philadelphia. The Washington doctors, in any case, will have to leave Washington to testify in person.

Norwood is the only one of the plaintiffs whose home is in this district. The heavy balance of convenience in favor of the defendant in connection with the liability witnesses applies to him equally with the others but, on the face of it, he has a stronger case than the others with regard to the medical witnesses. It appears from an affidavit filed by his

attorney that he has been treated by two physicians in Philadelphia and two in Chester (Dr. Farrell, also listed, is a radiologist). It also appears that he has been confined in two hospitals in this district and that he has undergone an operation in one of them, from which he is now recuperating. It does not appear how long he remained under medical care in the hospital in South Carolina nor when he returned to Philadelphia and began treatment with the doctors listed. It is, however, impossible to accept at its face value his contention that the difficulty and expense of getting these witnesses to trial would be such a burden as to make it grossly unjust to him to try the case at a point distant from Philadelphia, in view of the fact that he first selected Chicago as an appropriate and convenient forum. In August, 1953, some three months after the accident, he began a suit against this defendant in the state court there and, although he instituted the present action on September 21, 1953, he maintained the Chicago suit until December 4, 1953.

The motions to transfer will be granted.

Appropriate orders may be submitted.

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IN THE

Supreme Court of the United States

October Term NO. 337

ALEXANDER NORWOOD, *Petitioner*

vs.

HONORABLE WILLIAM H. KIRKPATRICK, etc.

JOSEPH F. TUNSTALL, *Petitioner*

vs.

HONORABLE WILLIAM H. KIRKPATRICK, etc.

JOHN E. SMALLWOOD, *Petitioner*

vs.

HONORABLE WILLIAM H. KIRKPATRICK, etc.

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania is not reported. A copy of this opinion appears in the record pp. 11-14. No opinion of the United States Court of Appeals for the Third Circuit was filed.

JURISDICTION

The order of the Court of Appeals for the Third Circuit was entered on July 16, 1954. A petition for a rehearing was denied on August 24, 1954. The jurisdiction of this Court is invoked under C. 646, Act of June 25, 1948, 62 Stat. 928 U. S. C. A., Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Is not Title 28 U. S. C. Section 1404(a), which was passed for the express purpose of allowing the federal courts to apply the doctrine of *forum non conveniens*, subject to the restrictions of *forum non conveniens?*

2. Is not mandamus a proper remedy where a federal district court judge has been forced against his will to follow an erroneous ruling of his Court of Appeals and therefore transfer a case under Title 28 U. S. C. Section 1404(a), since an appeal after the trial of the case is clearly an inadequate remedy which provides no remedy at all?

STATUTES INVOLVED

Act of June 25, 1948, C. 646, 62 Stat. 937, Title 28 U. S. C., §1404(a), which reads:

"§1404. *Change of venue*

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer

any civil action to any other district or division where it might have been brought."

* * * * * * * * *

Act of April 22, 1908, C. 149 §6, 35 Stat. 66 as amended June 25, 1948, C. 646, §18, 62 Stat. 989, Title 45 U. S. C., §56, which reads:

> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

STATEMENT OF THE CASE

These are actions under the Federal Employers' Liability Act, Title 45 U. S. C., Section 51, et seq., to recover damages for serious injuries suffered by the plaintiffs as a result of the derailment of an Atlantic Coast Line train near Dillon, South Carolina. Suits were instituted on behalf of these plaintiffs in the United States District Court for the Eastern District of Pennsylvania (1, 3, 5) which had jurisdiction by virtue of Title 45 U. S. C., Section 56. (1, 3, 5) Defendant filed motions to dismiss, or, in the alternative, to transfer, under Title 28 U. S. C., Section 1404(a), to the United States District Court for the Eastern District of South Carolina, Florence Division. (1, 3, 5) After argument had and affidavits filed, the Honorable William H. Kirkpatrick, on July 12, 1954, filed an opinion denying the motion to dismiss and granting the motion to transfer. (11-14)

The accident eventuating in the district court actions was the result of a derailment of a train in whose operation plaintiffs were not concerned. They were confined to, and

treated in, various hospitals, and were treated by a number of different doctors. However, the greater number of hospitals in which they were confined and treated, and the greater number of presently treating physicians, are located either in the Eastern District of Pennsylvania or in Washington, D. C., the latter, of course, being much closer to the Eastern District of Pennsylvania than to Florence, South Carolina. (14)

Petitioner Norwood resides in the Eastern District of Pennsylvania, where he brought suit (Chester, Pa.). (14)

Two of the petitioners (Smallwood and Tunstall) reside in Washington, D. C. (14)

It is proposed to transfer their cases to Florence, South Carolina. (1, 3, 5)

All of them are Negroes, (18) who prima facie will fare better in Philadelphia than in Florence, South Carolina.

Your petitioners filed an application in the Court of Appeals for the Third Circuit on July 13, 1954, for a writ of mandamus or prohibition, or both, directed to the District Court Judge. (1, 3, 5) This was denied on July 16, 1954. (7, 8) A petition for a rehearing was denied on August 24, 1954. (20, 21) A petition for a writ of certiorari was filed from the denial of the application for the writ of mandamus or prohibition, or both. Certiorari was granted on November 8, 1954. (22)

In granting the motion to transfer, the lower Court said: (12)

> "It is quite clear that the Court of Appeals for this Circuit holds that the discretion vested in the District Court to order a transfer under Title 28 U. S. C., Sec. 1404(a) is very much broader than I thought it was when I decided Naughton v. Pennsylvania R. Co., 85 F. Supp. 761. See All States Freight v. Modarelli, 196 F. 2d 1010. *It makes a difference in this case, because if the stringent requirements of the doctrine of forum non conveniens found in the decisions of the Supreme Court prior to the statute are to be*

applied I would feel that none of the three cases could properly be transferred. As it is, I think that the balance of convenience in all three cases is sufficiently in favor of the defendant to make the transfer proper." (Emphasis supplied.)

Thus, admittedly, the District Court Judge would have refused the motion to transfer had he not been forced to the contrary by the decision of the Court of Appeals for the Third Circuit, in *All States Freight v. Modarelli*, 196 F. 2d 1010 (C. A. 3, 1952), where that Court said, at page 1011:

"In the first place some district judges are applying section 1404(a) with a limitation imposed by the Supreme Court upon the doctrine of *forum non conveniens* as found in the Gulf Oil and Koster decisions.

"[2] The *forum non conveniens* doctrine is quite different from Section 1404(a). That doctrine involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else. It is quite naturally subject to careful limitation for it not only denies the plaintiff the generally accorded privilege of bringing an action where he chooses, but makes it possible for him to lose out completely, through the running of the statute of limitations in the forum finally deemed appropriate. Section 1404(a) avoids this latter danger. *Its words should be considered for what they say, not with preconceived limitations derived from the forum non conveniens doctrine.*" (Emphasis supplied.)

SUMMARY OF ARGUMENT

This case logically is separated into two sections. In the first section our argument is, in summary, that:

The District Court Judge in exercising his discretion would *not* have transferred these cases except for the fact that the Third Circuit in *All States Freight v. Modarelli*, 196 F. 2d 1010, (C. A. 3, 1952) held that section 1404(a) of the judicial code was *not* subject to the established limitations of the doctrine of *forum non conveniens*. Our argument proceeds from that to show that the legislative history of section 1404(a), the decisions of this Court, the decisions of other Circuit Courts, and the relationship between section 1404(a) and section 6 of the Federal Employers' Liability Act (45 U. S. C. A. §56) undeniably show that section 1404(a) is a codification of the doctrine of *forum non conveniens* and nothing more.

In the second section we argue, in summary, that:

An order granting a transfer being interlocutory is not appealable. An appeal after trial of a cause raising the question of the propriety of an order granting transfer is no remedy at all since the person ruled against cannot show prejudice. Therefore, under the decisions of this Court stating when mandamus is available, under the cases of this Court which hold that section 6 of the Federal Employers' Liability Act gave these petitioners who are railroaders a "substantial right", and under the decisions of many Circuit Courts they are entitled to the only remedy available to them to review an incorrect interpretation of section 1404(a)—namely, mandamus.

ARGUMENT

I. Title 28 U. S. C., 1404(a) was passed by Congress for the express purpose of allowing the Federal Courts to apply the doctrine of Forum Non Conveniens, and is subject to the limitations of Forum Non Conveniens.

These cases would be tried in Philadelphia, Pennsylvania, rather than Florence, South Carolina, if the trial judge had not been *compelled* to transfer them to the United States District Court for the Eastern District of South Carolina, against his will and his sense of justice by the rulings of the Court of Appeals in his circuit.

No matter what may be said of the numerous other cases which arise by virtue of motions to transfer under Title 28 U. S. C. 1404(a), admittedly, in these present cases, the motions for transfer would not have been granted if the law is that Title 28 U. S. C. 1404(a) is subject to the limitations of *forum non conveniens.* This is clearly set forth in the opinion of the Honorable William H. Kirkpatrick, Chief Judge of the United States District Court for the Eastern District of of Pennsylvania, where he said:

> " 'It is quite clear that the Court of Appeals for this Circuit holds that the discretion vested in the District Court to order a transfer under Title 28 U. S. C., Sec. 1404(a) is very much broader than I thought it was when I decided Naughton v. Pennsylvania R. Co., 85 F. Supp. 761. See All States Freight v. Modarelli, 196 F. 2nd 1010. *It makes a difference in this case, because if the stringent requirements of the doctrine of forum non conveniens found in the decisions of the Supreme Court prior to the statute are to be applied I would feel that none of the three cases could properly be transferred.* As it is, I think that the balance of convenience in all three cases is sufficiently in favor of the defendant to make the transfer proper.' " (Emphasis supplied.)

In other words, it is quite clear that the transfer of these cases would have been denied by the district court judge if the United States Court of Appeals for the Third Circuit had not held that Section 1404(a) was not subject to the restrictions of *forum non conveniens*, as it did in *All States Freight v. Modarelli*, 196 F. 2d 1010 (C. A. 3, 1953).

In that case the Third Circuit said, at page 1011:

> "In the first place some district judges are applying Section 1404(a) with a limitation imposed by the Supreme Court upon the doctrine of *forum non conveniens* as found in the Gulf Oil and Koster decisions.
>
> "[2] The *forum non conveniens* doctrine is quite different from Section 1404(a). That doctrine involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else. It is quite naturally subject to careful limitation for it not only denies the plaintiff the generally accorded privilege of bringing an action where he chooses, but makes it possible for him to lose out completely, through the running of the statute of limitations in the forum finally deemed appropriate. Section 1404(a) avoids this latter danger. *Its words should be considered for what they say, not with preconceived limitations derived from the forum non conveniens doctrine.*" (Emphasis supplied.)

It is equally clear that such interpretation by the Court of Appeals for the Third Circuit is in direct conflict with the interpretation of Section 1404(a) by all three other circuits that have considered the question.

These Courts of Appeals have held that Title 28 U. S. C., Section 1404(a) is subject to the limitation of *forum non conveniens*.

In *Ford Motor Co. v. Ryan*, 182 F. 2d 329 (C. A. 2, 1950), Judge Frank said, at page 330:

> "We *think that, by* § 1404(a), *Congress did not alter the standard theretofore embodied in the doctrine of forum non conveniens*, despite the fact that that section is applicable to types of actions to which that doctrine did not previously apply. So we read Ex Parte Collett, 337 U. S. 55, 69 S. Ct. 944, 959, 10 A. L. R. 2nd 921, and United States v. National City Lines, 337 U. S. 78, 69 S. Ct. 955, 10 A. L. R. 2d 921. On that basis *these words found in Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 508, 67 S. Ct. 839, 843, 91 L. Ed. 1055, *still have full vitality: 'But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.'* Those words we interpret to mean (a) that a defendant has the burden of making out a strong case for a transfer and (b) *that the plaintiff's privilege, conferred by statute, of choosing the forum he selected is a factor to be considered* as against the 'convenience' of the witnesses or what otherwise might be the balance of 'convenience' as between 'the parties'." (Emphasis supplied.)

In *Nicol v. Koscinski*, 188 F. 2d 537 (C. A. 6th, 1951), the Court of Appeals for the 6th Circuit decided that Section 1404(a) was subject to the limitations of the doctrine of *forum non conveniens* and said at p. 537:

> "It is clear that whether the order stands or is set aside, one of the litigants will be inconvenienced, and it became the duty of the district judge to balance inconveniences and to determine upon which litigant the greater hardship would rest, if he granted change of venue, and that determination was subject to the rule that *unless the balance is strongly in favor of the defendant the plaintiff's choice of forum should rarely be disturbed.*" (Emphasis supplied.)

In *Wiren v. Laws*, 194 F. 2d 873 (U. S. C. A. District of Columbia, 1951), the Circuit Court again applied the restriction of *forum non conveniens* to a determination of the question of transfer under Section 1404(a). The court said at p. 874:

> "Those criteria, applied to the §1404(a) situation, have been set out by Judge Frank in Ford Motor Co. v. Ryan, 2 Cir., 1950, 182 F. 2d 329, 330. After pointing out that the question is 'whether the judge abused his discretion,' he continues: '* * * by §1404(a), Congress did not alter the standard theretofore embodied in the doctrine of *forum non conveniens*, despite the fact that that section is applicable to types of actions to which that doctrine did not previously apply. So we read Ex parte Collett, 337 U. S. 55, 69 S. Ct. 944, 959, [93 L. Ed. 1207] 10 A. L. R. 2d 921, and United States v. National City Lines, 337 U. S. 78, 69 S. Ct. 955, [93 L. Ed.] 1226, 10 A. L. R. 2d 921. On that basis, these words found in Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 508, 67 S. Ct. 839, 843, 91 L. Ed. 1055, still have full vitality: "But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." Those words we interpret to mean (a) that a defendant has the burden of making out a strong case for a transfer and (b) that the plaintiff's privilege, conferred by statute, of choosing the forum he selected is a factor to be considered as against the "convenience" of witnesses or what otherwise might be the balance of "convenience" as between "the parties".'"

Indeed, the Third Circuit itself recognized that many of the District Courts and Courts of Appeals were applying the limitations of *forum non conveniens* to Section 1404(a), and that it was in conflict with these other courts. It said

in *All States Freight v. Modarelli*, 196 F. 2d 1010 (C. A. 3, 1953) at p. 1011:

> "In the first place some district judges are applying section 1404(a) with a limitation imposed by the Supreme Court upon the doctrine of *forum non conveniens* as found in the Gulf Oil and Koster decisions."

and at p. 1012:

> *"We realize that the view we express is not the one which some of our judicial brethren are following with regard to this statute."* (Emphasis supplied.)

Having stated this history of the litigation of the instant cases and the present situation with respect to the interpretation of Section 1404(a) in the Courts of Appeals, we turn now to the crucial issue before the Court. Simply it is: Did not Congress intend to make the established, well recognized, and clearly delineated doctrine of *forum non conveniens* as declared in *Gulf Oil Corporation v. Gilbert*, 330 U. S. 501, 67 S. Ct. 839 (1946), applicable to the federal courts when it adopted Section 1404(a) to Title 28?

It is not difficult to determine the answer to this issue for the legislative history of the Act is set forth at great length and with exacting detail in this court's opinion in *Ex Parte Collett*, 337 U. S. 55, 69 S. Ct. 944 (1949).

This legislative history shows beyond any peradventure of doubt that this section was no more than an adoption of *forum non conveniens*. It shows that Congress *did not intend* to unsettle the law and evolve entirely new principles controlling the question of transferring actions but merely thought it advisable to give the federal courts the power to transfer cases when, under the established principles of *forum non conveniens*, it was wise to so do.

This Court is well aware of the persons and time in-

volved in preparing the Code. *Ex Parte Collett*, 337 U. S. 55, 65, 66, 69 S. Ct. 944, 949, 950 (1949):

> "This was scarcely hasty, ill-considered legislation. To the contrary, it received close and prolonged study. Five years of Congressional attention supports the Code. And from the start, Congress obtained the most eminent expert assistance available. The spadework was entrusted to two lawbook-publishing firms, the staffs of which had unique experience in statutory codification and revision. They formed an advisory committee, including distinguished judges and members of the bar, and obtained the services of special consultants. Furthermore, an advisory committee was appointed by the Judicial Conference. And to assist with matters relating to the jurisdiction of this court, Chief Justice Stone appointed an advisory committee, consisting of himself and Justices Frankfurter and Douglas."

The most important clue to the solution of issue now before the Court is found in the reviser's note to this important action and its history in the path of the bill through Congress. Such reviser's note reads:

> "'*Subsection (a) was drafted in accordance with the doctrine of forum non conveniens*, permitting transfer to a more convenient forum even though the venue is proper. As an example of the need of such a provision, see Baltimore & Ohio R. Co. v. Kepner, 1941, 314 U. S. 44, 62 S. Ct. 6, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the Court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so.'" (Emphasis supplied.)

Again, the history of these notes is clearly explained in *Ex Parte Collet*, 337 U. S. 55, 68-71, 69 S. Ct. 944, 951-952, (1949):

> "The initial appearance of §1040(a) was in the Second Draft of the Code, adopted by the meeting of May, 1945. Its text has remained unchanged. It was accompanied by a reviser's note, which recited that 'Subsection (a) is new. It was drafted in accordance with a memorandum of March 7, 1945, from the author of Moore's Federal Practice, stating that recognition should be given the doctrine of *forum non conveniens.* * * *' The balance of that note was substantially the same as the present reviser's note; it expressly cited the Kepner case, an action under the Federal Employers' Liability Act as demonstrating the need for §1404(a). *And the reviser's notes were before the Congress at every subsequent legislative step.*
>
> "A preliminary draft of the Code was printed late in 1945 for the use of the House Committee on Revision of the Laws. In this draft, the reviser's notes appear directly below each related section or subsection. Section 1404(a) and its note were in this draft, which, as noted above, was given very wide circulation.
>
> "July 24, 1946, the House ordered to be printed the Report submitted by Representative Keogh of New York, Chairman of the House Committee on Revision of the Laws, on the codification of Title 28. This Report consisted of a preliminary statement *and a full printing of the reviser's notes.* Section 1040(a) appears in that Report, together with its note. There was no further action on the Code in the Seventy-Ninth Congress.
>
> "In the Eightieth Congress, under the Legislative Reorganization Act of 1946, the Code revision passed to the jurisdiction of the House Judiciary Committee and was assigned to a Subcommittee of which Repre-

sentative Robinson of Kentucky was Chairman. At the hearing before this Subcommittee, Professor James William Moore of Yale University, special consultant to the revisers, in summarizing the Code proposals, testified that there were 'changes of importance' in the law of venue and specifically mentioned §1404. In April, 1947, the House Judiciary Committee reported the bill with a unanimous recommendation that it be passed. This Report *again fully reprinted the reviser's notes.* In this Report, the section entitled 'Examples of Cnanges in Law,' which had appeared in the Report on the revision in the preceding Session of Congress, expressly referred to the reviser's notes for §§1391-1406.

"After this painstaking consideration, with its references to §1404(a), the House initially passed the bill on July 7, 1947. At that time and in the subsequent consideration in the Senate, the Tax Court provisions occasioned the most discussion; but other specific sections did not pass unnoticed. Attention was directly called to §1404(a) by one witness at the hearings before the Senate Judiciary Subcommittee, although his interest was not in the Federal Employers' Liability Act issue. No change in §1404(a) was included in the Senate amendments; and the revision of Title 28 was enacted by the Congress in June 1948.

"Thus, at almost every stage of the legislative procedure, attention was directed to the fact of change, and in most instances specific mention was made of §1404(a). *At no stage subsequent to the first formal printing did §1404(a) and its accompanying reviser's note fail to appear.* From the start, §1404(a) remained the same, and the reference in the note to a Federal Employers' Liability Act case as showing the need for permitting the application of *forum non conveniens* remained unchanged. Not to hold that Congress did not appreciate what it was enacting in

> that section would defy the legislative history. We must flatly reject petitioner's thesis that this section was so obscured that its enactment is meaningless. We cannot blind ourselves to the hearings, to the experts, to the Committee reports, to the reviser's notes and their incorporation in the Committee reports—to a history of the most meticulous Congressional consideration." (Emphasis supplied.)

To decide now that the principles and limitations of *forum non conveniens* do not apply this court must necessarily refuse to consider the reviser's notes which were relied upon so heavily in *Ex Parte Collett.*

Furthermore, as recently as April 1953, your Honorable Court in *Pope v. Atlantic Coast Line R. Co.*, 345 U. S. 379, 73 S. Ct. 749 quoted in Footnote 10, p. 385, the reviser's note which said:

> "'Subsection (a) was drafted *in accordance with the doctrine of forum non conveniens*, permitting transfer to a more convenient forum, even though the venue is proper.'" (Emphasis supplied.)

These reviser's notes are important and conclusive of the intent of Congress. There is no reason to destroy such intent to give the district court judges more power than Congress intended. Indeed, on the other hand, there is real reason to permit Congress' intent to be carried out. Indeed, if the special venue provisions of the Federal Employers' Liability Act, 45 U. S. C. A. 51 et seq. which this Court in *Pope v. Atlantic Coast Line, supra*, and *Boyd v. Grand Trunk Western R. Co.*, 338 U. S. 263, 70 S. Ct. 26 (1949), held still the law and binding on the courts, is to truly afford the injured railroad employee any choice of venue, this self arrogation of power to limit jurisdiction must be conclusively thwarted.

It is undoubtedly true that this Court, the Second Circuit, the Sixth Circuit, and the Court of Appeals for the District of Columbia have correctly interpreted §1404(a)

as subject to the same limitations as are found in the doctrine of *forum non conveniens*. Whatever may be said of other types of actions, employees bringing suit under the Federal Employers' Liability Act were given a "substantial right" to select their forum by Section 6 of the Federal Employers' Liability Act. Indeed, your Honorable Court, in *Boyd v. Grand Trunk Western R. Co.*, 338 U. S. 263, 70 S. Ct. 26 (1949), held that the venue rights afforded by Section 6 of the Federal Employers' Liability Act were so strong that they could not be contracted away and said (p. 266) (70 S. Ct. 28):

> "And nothing in Ex parte Collett, 1949, 337 U. S. 55, 69 S. Ct. 944, affects the initial choice of venue afforded Liability Act plaintiffs. We state expressly that the section of the Judicial Code there involved, 28 U. S. C. §1404(a), 28 U. S. C. A. §1404(a), *'does not limit or otherwise modify any right granted in §6 of the Liability Act or elsewhere to bring suit in a particular district.* An action may still be brought in any court, state or federal, in which it might have been brought previously.' 337 U. S. at page 60, 69 S. Ct. at page 947.
>
> "The right to select the forum granted in Section 6 is a *substantial right.*"

The interpretation which the Third Circuit has given Section 1404(a) not only limits and modifies the right granted in Section 6 of the Federal Employers' Liability Act, but destroys the "substantial right" given to such plaintiffs by such Section. The decision in *All States Freight Co. v. Modarelli*, supra, is a mandate to district court judges to refuse to recognize the plaintiff's choice of forum as a factor. Judge Frank, in *Ford Motor Co. v. Ryan*, 182 F. 2d 329 (C. A. 2, 1950), said, at page 330:

> " * * * We think that, by §1404(a), Congress did not alter the standard theretofore embodied in the

doctrine of *forum non conveniens*, despite the fact that that section is applicable to types of actions to which that doctrine did not previously apply. So we read Ex Parte Collett, 337 U. S. 55, 69 S. Ct. 944, 959, 10 A. L. R. 2d 921, and United States v. National City Lines, 337 U. S. 78, 69 S. Ct. 955, 10 A. L. R. 2d 921. On that basis, these words found in Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 508, 67 S. Ct. 839, 843, 91 L. Ed. 1055, still have full vitality: 'But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.' Those words we interpret to mean (a) that a defendant has the burden of making out a strong case for a transfer and (b) *that the plaintiff's privilege, conferred by statute, of choosing the forum he selected is a factor to be considered as against the 'convenience' of the witnesses or what otherwise might be the balance of 'convenience' as between 'the parties'.*" (Emphasis supplied.)

Compare, also, the language of Judge Learned Hand, in the same case, where he said, at p. 332:

"I wish to put my vote solely upon the ground that §15 of Title 15 U. S. C. A. gives to a plaintiff a privilege which a defendant must overcome by more than a bare balance of convenience between the two forums. If I thought that we had before us an unweighted choice between New York and Detroit, based upon that consideration, I should choose Detroit; indeed, I should think it a clear abuse of discretion to hold otherwise. *However, as I understand it, the privilege granted by §15 still counts in the scale:* a defendant must do more than show that the transfer will on the whole make the trial more convenient; it must make the trial markedly more convenient." (Emphasis supplied.)

It is this language which the Third Circuit rejects in the case of *All States Freight Co. v. Modarelli*, supra. If the "plaintiff's privilege, conferred by statute, of choosing the forum he selected" is rejected, as "a factor to be considered as against the convenience of witnesses or what otherwise might be the balance of convenience as between the parties", there is nothing left of the plaintiff's venue privileges under Section 6 of the Federal Employers' Liability Act.

The decision in *All States Freight Co. v. Modarelli*, supra, compels district court judges to choose *the most* convenient forum and transfer, upon motion, the case to that forum. Since there can be only one *most* convenient forum, this interpretation undoubtedly destroys all rights given to plaintiffs by Section 6 of the Federal Employers' Liability Act,[1] and forces them to litigate their cause, not in the "district of the residence of the defendant in which the cause of action arose, or in which the defendant is doing business"— the words of Section 6—but in only *one place: the* most convenient forum. As examples of this interpretation of the effect of the *Modarelli* decision, we point to *Paragon-Revolute Corp. v. C. F. Pease Co.*, 120 F. Supp. 488 (U. S. D. C., D. Del., 1954); *General Felt Products Co. v. Allen Industries, Inc.*, 120 F. Supp. 491 (U. S. D. C., D. Del., 1954), whereJudge Leahy, bound by the *Modarelli* decision, considered numerous forums and chose *the* most convenient one.

Chief Judge William H. Kirkpatrick also decided the case of *Naughton v. Pennsylvania R. Co.*, 85 F. Supp. 761 U. S. D. C. E. D. Pa., 1949). He there held that Section 1404(a) was subject to the limitation of the doctrine of *forum non conveniens* and said (pp. 763-764):

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[1] If it be thought that the forum for the trial of a case is of little practical importance in the administration of justice, it need only be pointed out that the three seriously injured petitioners involved in this case are negroes, who must, if the transfer is granted, try their cases before a jury in South Carolina.

"It is my opinion that, whatever inconvenience may result to the defendant from trying these cases in Philadelphia, it is not so great as to allow the Court, under the well established limitations of the doctrine forum non conveniens, to transfer the cases to Pittsburgh; nor do I think that the interests of justice imperatively require it if balanced against the importance of allowing the plaintiff freedom of choice among forums of unquestioned venue. After all, Section 6 of the Federal Employers' Liability Act was designed to give the injured employee a wide choice of forum in which to bring his action. It has not been repealed and the underlying policy remains and should be carried out whenever possible unless serious inconvenience or injustice to the defendant will result. *The view contended for by the defendant would come close to making Section 1404(a) a venue statute, under which the court, after striking a nice balance of conveniences, would be bound to limit the plaintiff to a single jurisdiction.* If that had been the purpose, the statute would have directed the courts to make transfers to the most convenient jurisdiction — a very different question from that involved in the doctrine of forum non conveniens." (Emphasis supplied.)

The interpretation there sought by the railroad company was directly contrary to your Honorable Court's decisions in *Ex Parte Collett*, supra; *Boyd v. Grand Trunk Western R. Co.*, supra; and *Pope v. Atlantic Coast Line R. Co.*, supra. In *Pope v. Atlantic Coast Line*, supra, this Court said, at pages 386, 387 (73 S. Ct. at page 753):

"Congress might have gone further; it might have vested state courts with the power asserted here. In fact, the same Congress which enacted §1404(a) *refused to enact a bill which would have amended §6 of the Federal Employers' Liability Act by limiting the*

employee's choice of venue to the place of his injury or to the place of his residence.

"This proposed amendment—the Jennings Bill—focused Congress' attention on the decisions of this Court in both the Miles and the Kepner cases. The broad question—involving many policy considerations—of whether venue should be more narrowly restricted, was reopened; cogent arguments—both pro and con—were restated. Proponents of the amendment asserted that, as a result of the Miles and Kepner decisions, injured employees were left free to abuse their venue rights under §6 and 'harass' their employers in distant forums without restrictions. They insisted that these abuses be curtailed.

"These arguments prevailed in the House which passed the Jennings Bill, but the proposed amendment died in the Senate Judiciary Committee, and §6 of the Federal Employers' Liability Act was left just as this Court had construed it."

Indeed, the former Governor of California and now Chief Justice of this Court spoke regarding an effort of the California Legislature, in 1953, to incorporate a doctrine of *forum non conveniens* into the law of that state. (Senate Bill No. 789.) In vetoing such bill, he said:

"If we are to whittle away in this manner the benefits conferred by the Federal Employers' Liability Act, it would soon lose *its national uniformity and could at least substantially weaken the purposes for which the act was originally designated.* I am not advised that other states have enacted such legislation. The fact that this act has been in effect since 1908 without similar legislation being enacted in other states would indicate a nationwide appreciation of the desirability for this uniformity. At all events if any of the provisions of the act result in a denial of justice to either plaintiffs or defendants, the situation could re remedied nationwide by a simple act of Congress." (Emphasis supplied.)

If Section 6 is to continue to have the vitality attributed to it by your Honorable Court, in consistent and unwavering decisions, the interpretations of Section 1404(a) by the Third Circuit in *All States Freight v. Modarelli*, supra, cannot be allowed to stand.

We turn now to the precise reason, and we submit the only reason advanced by the Third Circuit in *All States Freight v. Modarelli*, 196 F. 2d 1010 (C. A. 3, 1953) to disagree with all of the other Circuits that have considered the question:

> "In the first place some district judges are applying Section 1404(a) with a limitation imposed by the Supreme Court upon the doctrine of *forum non conveniens*, as found in the Gulf Oil and Koster decisions.
>
> "[2] The *forum non conveniens* doctrine is quite different from Section 1404(a). That doctrine involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else. It is quite naturally subject to careful limitation for it not only denies the plaintiff the generally accorded privilege of bringing an action where he chooses, but makes it possible for him to lose out completely, through the running of the statute of limitations in the forum finally deemed appropriate. Section 1404(a) avoids this latter danger. *Its words should be considered for what they say, not with preconceived limitations derived from the forum non conveniens doctrine.*" (Emphasis supplied.)

It is quite clear that this reasoning proceeds upon the theory that the words of the statute are there and because nothing is said one way or the other in the statute about *forum non conveniens*, the limitation of *forum non conveniens* should not apply.

The question of statutory interpretation here involved

is not so simple. This is not a case where the statute is clear and unambiguous. *The statute here says nothing one way or the other concerning the limitations of forum non conveniens.* We are not here trying to use the Congressional history of the Act to make words mean something different from what they say: Cf. *Ex Parte Collett*, 337 U. S. 55, 69 S. Ct. 944 (1949), (where this Court, in the face of the words "any civil action" refused to make the statute inapplicable to suits under the Federal Employers' Liability Act). Rather, we are here attempting to determine Congressional intent concerning the principles to be used in applying the general words of the statute "convenience of parties and witnesses" and "interests of justice".

We submit that Congress in enacting this section of the Code merely used a shorthand method of expressing *forum non conveniens.* That it has so been regarded by all the other courts is undoubtedly true.

In *Ex Parte Collett*, 337 U. S. 55, 69 S. Ct. 944 (1949), your Honorable Court had before it the question of whether Section 1404(a) was applicable to Federal Employers' Liability cases. Chief Justice Vinson, in stating the question that was then before the Court, said, at page 56 (69 S. Ct., p. 945):

> "In this case we must decide whether the venue provisions of the Judicial Code *render applicable the doctrine of forum non conveniens to actions under the Federal Employers' Liability Act.*" (Emphasis supplied.)

This Court in the same case said at pages 57 and 58 (69 S. Ct., p. 946):

> "The reviser's notes, which accompany each section of the Code, here read as follows: '*Subsection (a) was drafted in accordance with the doctrine of forum non conveniens*, permitting transfer to a more convenient forum even though the venue is proper. As an

example of the need of such a provision, see Baltimore & Ohio R. Co. v. Kepner, 1941, 314 U. S. 44, 62 S. Ct. 6, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the Court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so.' The precise issue before us is whether, despite these expressions, the law remains unchanged. Petitioner so contends." (Emphasis supplied.)

It is therefore apparent that the revisers of the Judicial Code clearly intended to make the doctrine of *forum non conveniens* applicable and nothing more. The whole tone and tenor of the opinion of *Ex Parte Collett* is one of a discussion of *forum non conveniens*, and does not, in any fashion, support the interpretation of Section 1404(a) which the Third Circuit has now decided to be the correct one. This Court said, in 337 U. S., at pages 60 and 61 (69 S. Ct. 947):

"The inapplicability of *forum non conveniens* to Liability Act suits derives from the Kepner decision. And there this Court expressly stated that 'If it is deemed unjust, the remedy is legislative * * *.' 314 U. S. at page 54, 62 S. Ct. at page 10, 86 L. Ed. 28. That opinion discusses §6 of the Liability Act, to be sure, but this Court did not and could not suggest that the legislative answer had necessarily to be addressed to that section. Since the words selected by Congress for §6 denote nothing, one way or the other, respecting *forum non conveniens*, there was no occasion to repeal that section, expressly or impliedly; Congress chose to remove its judicial gloss via another statute. Discussion of the law of implied repeal is, therefore, irrelevant."

and at page 65 (69 S. Ct., page 949):

> "His argument is obviously based not on the actual legislative history of §1404(a), but on necessarily vague speculation as to what Congress might have done had it fully realized that *forum non conveniens was henceforth to be applicable in Federal Employers' Liability Act suits.*" (Emphasis supplied.)

and at page 68 (69 S. Ct., page 951):

> "It was drafted in accordance with a memorandum of March 7, 1945, from the author of Moore's Federal Practice, stating that *recognition should be given the doctrine of forum non conveniens.* * * * " (Emphasis supplied.)

and, at page 71 (69 S. Ct., page 952):

> "From the start, Section 1404(a) remained the same, and the reference in the note to a Federal Employers' Liability Act case as showing the need for permitting the application of *forum non conveniens* remained unchanged."

This Court, in *Pope v. Atlantic Coast Line R. Co.*, 345 U. S. 379, 73 S. Ct. 749 (1953), reiterated its holding in *Ex Parte Collett*, at page 383 (73 S. Ct., page 751):

> "We have heretofore held that §1404(a) makes *the doctrine of forum non conveniens applicable to Federal Employers' Liability Act cases* brought in federal courts and provides for the transfer of such actions to a more convenient forum. Ex Parte Collett, 1949, 337 U. S. 55, 69 S. Ct. 944, 959, 93 L. Ed. 1207." (Emphasis supplied.)

In *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U. S. 180, 72 S. Ct. 219 (1952), Mr. Justice Frankfurter speaking for this Court said, p. 186 (S. Ct., p. 222):

> "And if the manufacturer is joined as an unwilling defendant in a *forum non conveniens*, he has avail-

able upon an appropriate showing the relief provided by §1404(a) of the Judicial Code. 62 Stat. 869, 937, 28 U. S. C. §1404(a), 28 U. S. C. A. §1404(a)."

Again in *Wells v. Simonds Abrasive Co.*, 345 U. S. 514, 73 S. Ct. 856 (1953), in a dissenting opinion, Justice Jackson, with whom Justices Black and Minton joined, said, at page 522 (S. Ct., p. 860):

> "28 U. S. C. §1404(a) authorizes certain transfers of any civil action from state to state for the convenience of witnesses or of parties, or in the interests of justice. *The purpose was to adopt for federal courts the principles of forum non conveniens.* Ex Parte Collett, 337 U. S. 55, 69 S. Ct. 944 L. Ed. 1207. These are broad and imprecise and involve such considerations as the state of the court's docket. Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 67 S. Ct. 839, 91 L. Ed. 1055." (Emphasis supplied.)

The majority opinion did not discuss this matter nor disagree in any respect with *this* statement by the dissenters.

We have already pointed out that in *Ford Motor Co. v. Ryan*, 182 F. 2d 329 (C. A. 2, 1950), the Second Circuit viewed 1404(a) as a *forum non conveniens* codification and that the Sixth Circuit and the Court of Appeals for the District of Columbia came to the same conclusion.

Numerous District Courts have regarded the statute in the same light.

Rhodes v. Barnett, 117 F. Supp. 312 (U. S. D. C. S. D. N. Y. 1953);

Lehn & Fink Products Corp. v. Milner Products Co., 117 F. Supp. 320 (U. S. D. C. S. D. N. Y. 1953);

United States v. Switzer Bros., 115 F. Supp. 49 (U. S. D. C. N. D. Calif., S. D. 1953);

Duffy v. United States, 114 F. Supp. 881 (U. S. D. C. S. D. N. Y. 1953);

Faucette v. Lykes Bros., S. S. Co., 110 F. Supp. 287 (U. S. D. C. S. D. N. Y. 1953);
Markantonatos v. Maryland Drydock Co., 110 F. Supp. 862 (U. S. D. C. S. D. N. Y. 1953);
Wheeler v. Societe Nationale Des Chemins, Etc., 108 F. Supp. 652 (U. S. D. C. S. D. N. Y. 1952);
Ronson Art Metal Works v. Brown & Bigelow, 105 F. Supp. 169 (U. S. D. C. S. D. N. Y. 1952);
Jenkins v. Wilson Freight Forwarding Co., 104 F. Supp. 422 (U. S. D. C. S. D. N. Y. 1952);
Lynch v. Luckenbach S. S. Co., Inc., 104 F. Supp. 494 (U. S. D. C. S. D. N. Y. 1952);
McDaniel v. Drotman, 103 F. Supp. 643 (U. S. D. C. W. D. Ky. 1952);
Oritz v. Union Oil Co. of California, 102 F. Supp. 492 (U. S. D. C. S. D. N. Y. 1952);
Reade Shirts v. Commonwealth Ins. Co. of New York, 102 F. Supp. 941 (U. S. D. C. S. D. N. Y. 1952);
Federal Electric Products Co. v. Frank Adam Electric Co., 100 F. Supp. 8 (U. S. D. C. S. D. N. Y. 1951);
Nicol v. J. C. Penny Co., 97 F. Supp. 83 (U. S. D. C. E. D. Mich. 1951);
Mazinski v. Dight, 99 F. Supp. 192 (U. S. D. C. W. D. Pa. 1951);
Webster-Chicago Corp. v. Minneapolis-Honeywell Reg. Co., 99 F. Supp. 503 (U. S. D. C. D. Del. 1951);
Goodman v. Southern Ry. Co., 99 F. Supp. 852 (U. S. D. C. S. D. N. Y. 1951).

If, as has been demonstrated above, this Court, three Courts of Appeals, and numerous District Courts regard the statute as a codification of *forum non conveniens*, is it not reasonable to suppose that Congress thought the same when they enacted the statute? And, especially, is this not the true situation when Congress had the reviser's notes before them from the time that the section first appeared and "at every subsequent legislative step." *Ex Parte Collett*, 337 U. S. 55 at pp. 68, 69, 69 S. Ct. 944, 951 (1949).

This interpretation of section 1404(a) as a codification of the doctrine of *forum non conveniens* by this Court, the Courts of Appeals and the District Courts, with the only dissenting voice that of the Third Circuit, affirmatively demonstrates that the words of the statute in no wise render the principles to be applied as clear as the Third Circuit apparently believes, and that the Courts must turn to the reviser's note in order to determine the Congressional intent.

This reviser's note reads:

> "*Subsection (a) was drafted in accordance with the doctrine of forum non conveniens*, permitting transfer to a more convenient forum even though the venue is proper. As an example of the need of such a provision, see Baltimore & Ohio R. Co. v. Kepner, 1941, 314 U. S. 44, 62 S. Ct. 6, 86 L. Ed. 28, which was prosecuted under the Federal Employers' Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the Court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so." (Emphasis supplied.)

We respectfully submit that this note, the previous cases of this Court, the Courts of Appeals and the District Courts demonstrate beyond a shadow of a doubt that the settled principles and limitations of *forum non conveniens* were codified by the enactment of Section 1404(a) of Title 28.

II. Mandamus is a proper remedy where a Federal District Court Judge has been forced against his will to follow the erroneous ruling of his Court of Appeals and transfer a case under Title 28 U. S. C., Section 1404(a) where an appeal after the trial of the case is a clearly inadequate remedy and, indeed, provides no remedy at all.

Before analyzing the cases relating to mandamus it seems advisable to indicate precisely what the issue before the Court of Appeals for the Third Circuit was and what the exact issue before this Court is.

No attempt was or is being made to review the discretion of the district court judge. He has already said that if the stringent requirements of the doctrine of *forum non conveniens* found in the decisions of the Supreme Court prior to the statute are to be applied he would feel that none of the three cases could properly be transferred. Thus, the sole question is whether these limitations apply. If they do, the trial court judge would have exercised his discretion in favor of petitioners. If they do not he would exercise his discretion in favor of the transfer.

In order to determine whether mandamus should be available under such circumstances we start with the proposition that mandamus "against judges are drastic and extraordinary remedies." *Ex Parte Fahey*, 332 U. S. 258, 259, 260, 67 S. Ct. 1558, 1559 (1947). But this is not a be all and end all of whether or not mandamus is available. This court in *Ex Parte Fahey*, supra, went on to say, p. 260, S. Ct., p. 1559:

> "*These remedies should be resorted to only where appeal is a clearly inadequate remedy.* We are unwilling to utilize them as a substitute for appeal. As extraordinary remedies they are reserved for really extraordinary causes." (Emphasis supplied.)

Is appeal a clearly inadequate remedy in this situation? Of this there can be no doubt.

There is no initial appeal from an order granting or refusing a transfer: *Jiffy Lubricator Co. v. Stewart-Warner Corp.*, 117 F. 2d 360 (C. A. 4, 1949). Thus, the only appeal to be had would be *after* the trial of the actions. At that time any party would find it impossible to show prejudice. How as a practical matter can one meet such a burden of proof?

It is for this reason that five circuits have held that the remedy of the writ is available in cases involving transfer orders under section 1404(a). *Ford Motor Co. v. Ryan*, 182 F. 2d 329 (1950), where Judge Frank said at p. 330:

> "Judge Swan thinks we have no power to grant a writ of mandamus. Judge Hand and I think this the kind of interlocutory order with which this court can properly deal by way of such a writ, since should petitioners—the defendants—finally lose on the merits below, any error in the interlocutory order would probably be incorrectible on appeal, for petitioners could hardly show that a different result would have been reached had the suit been transferred. Nor, should petitioners win on the merits below, could they collect as costs the additional expenses to them, if any, due to the court's failure to order the transfer. We recognize that the dividing line is by no means entirely clear between the power of this court and its lack of power to issue the writ. But we think this a sufficiently 'extraordinary cause' to empower us to do so, if the district judge erred."

It was also relied upon in *Chicago R. I. & P. R. Co. v. Igoe*, 212 F. 2d 378 (C. A. 7, 1954) where that Court said, p. 381:

> "While a ruling on a motion under Section 1404-(a) to transfer is not an appealable order, Ford Motor Co. v. Ryan, supra; Jiffy Lubricator Co. v. Stewart-Warner Corp., 4 Cir., 177 F. 2d 360, *it is the type of order which may, absent the power of this court to correct it in any case, give rise to judicially sanctioned irreparable procedural injury.*" (Emphasis supplied.)

In *Atlantic Coast Line v. Davis*, 185 F. 2d 766, 768 (C. A. 5, 1950), the court said:

> "At the outset of our consideration of the propriety of the retransfer, we are faced with the ques-

tion of our jurisdiction either to issue the writ, or to consider the appeal. *We think it clearly apparent from the facts stated that this is an extraordinary cause, and that it is of a nature which renders the likelihood of any fair and effective correction of the action of the Court by subsequent appeal, if this should be determined legally necessary, highly improbable, if not impossible.*" (Emphasis ours.)

In *Wiren v. Laws*, 194 F. 2d 873, 874 (U. S. C. A. Dist. of Col., 1951), the court said:

"The order of transfer was issued in reliance on 28 U. S. C. §1404(a), which provides: 'For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.' It is urged at the outset that the order contemplated by the quoted statute is interlocutory in nature and may neither be appealed nor subjected to the review incidental to a mandamus proceeding. It is clear enough that the order is not appealable and we do not understand appellant to make any contention to the contrary. But the question of review by mandamus is one of first impression in this circuit, though it has been the subject of decision in several other circuits. The concensus of such decisions is that jurisdiction to issue the writ in aid of the reviewing courts' appellate jurisdiction exists where the grounds for transferring the cause are insufficient to support the order and to bring it within the terms of the statute. And so understood we are in agreement. *If we were to hold even unauthorized orders of transfer to lie beyond our control, the effect would be to deprive litigants of forums to which they are entitled.* The only appealable order which would ultimately issue in the wake of such disclaimer on our part would then be in the forum to which the cause had been trans-

ferred and perhaps only after the case had been disposed of on the merits. But see Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co., 2 Cir., 1950, 178 F. 2d 866. Neither the statute nor the cases require such a result. We hold that an order of transfer pursuant to 28 U. S. C. §1404(a) may be reviewed in the light of the criteria customarily associated with mandamus and similar remedies." (Emphasis ours.)

See also *Shapiro v. Bonanza Hotel Co., Inc.*, 185 F. 2d 777, 779 (1950).

Indeed, upon appeal after a trial on the merits an appellant complaining of an order granting or refusing a transfer would be faced with Rule 61 of the Federal Rules of Civil Procedure which provides that the error concerning which he complains must be shown to be harmful. It would be impossible to show harm in a situation of this kind.

We recognize that this court zealously guards against the issuance of the extraordinary writ of mandamus and that the inconvenience, hardship and expense—to the judiciaries and the parties involved assuming the transfer order to be incorrect, is of little materiality since Congress has contemplated these difficulties and not provided for an appeal from an interlocutory order: *Bankers Life and Casualty Co. v. Holland*, 346 U. S. 379, 74 S. Ct. 145 (1954). And that if an erroneous transfer order could be corrected on appeal after the trial of a case, these difficulties would not be sufficient so that mandamus should issue. *But the plain indisputable fact is that*, in these case is it impossible for these petitioners to affect a correction by an appeal subsequent to trial—they simply could not show any prejudice resulting from the transfer order.

Bankers Life & Casualty Co. v. Holland, 346 U. S. 379, 74 S. Ct. 145 (1954), is not at all dispositive of the issue now before this court. First: Petitioner, in that case, admitted that an order finding improper venue and then

ordering a transfer was an order which could ". . . eventually . . . be reviewed on appeal from final judgment in the case." Second: The court said, S. Ct. p. 148:

> "Furthermore, whatever *'Judicial inconvenience and hardship' may exist here will remain, after transfer, within the realm of the same court of appeals which has denied the writ, since both of the districts are within that circuit;* and it is not clear that adequate remedy cannot be afforded petitioner in due course by that court to prevent some of the conflicts and procedural problems anticipated." (Emphasis supplied.)

Thus, in that case there was no showing that petitioner was without an available remedy.

The issue in that case was whether the court ordering the transfer had the power—a question always reviewable upon appeal after a final judgment and correctible without a showing of prejudice. The instant case concerns no such question regarding the existence of a power to transfer but merely a legal question dealing with the limitations upon that power. As before demonstrated, such question cannot effectively or, indeed, at all, be reviewed upon appeal after final judgment.

In *Chicago R. I. & P. R. Co. v. Igoe*, 212 F. 2d 378, (C. A. 7, 1954), Judge Lindley made this cogent distinction in holding that mandamus does lie to correct an order under Section 1404(a). The court there said, p. 381:

> "Respondent's principal reliance on Bankers Life & Casualty Co. v. Holland, 346 U. S. 379, 74 S. Ct. 145, is misplaced. There the court held that mandamus would not lie to review an order entered under 28 U. S. C. §1406(a). *Suffice it to say that that Section, unlike Section 1404(a), deals with a situation of total want of venue and is mandatory.* If venue is improper, the district court must *either dismiss* or *transfer* the cause to a court in which venue lies. If the court does neither, any judgment entered in the cause is *a nullity*, an *error correctible on appeal.*" (Emphasis supplied.)

See also *Gulf Research and Development Co., v. Leahy*, 193 F. 2d 302 (C. A. 3, 1951), cert. granted 343 U. S. 925, 72 S. Ct. 762 and affirmed per cur. by an equally divided court, 344 U. S. 861, where Judge Maris makes the same distinction between cases involving Section 1406(a) of Title 28 U. S. C. and cases involving Section 1404(a) of Title 28 U. S. C. He said at p. 305:

> "The petitioners argue that writs of mandamus have been granted by courts of appeals in cases involving the transfer of actions from one district to another and it cites a number of cases from various courts of appeals, including ours. *Those cases, however, have all involved transfers under Sec. 1404(a) of Title 28 U. S. C., the forum non conveniens section.* As we pointed out in Pennsylvania Turnpike Commission v. Welsh, 3 Cir., 1951, 188 F. 2d 447, 449, footnote 2, *these cases normally deal with an issue, the convenience of parties and witnesses, 'which in its nature must be reviewed before trial, if at all.'* It may, therefore, be, as some courts of appeals have held, that the remedy of mandamus should be available to prevent an abuse of discretion in such transfers. Moreover this court has held that mandamus is available in such a case to direct a district judge to exercise his discretion when he has declined to do so on the erroneous ground that the *statute does not give him discretionary power to make the transfer requested.*" (Emphasis ours.)

Thus, petitioners are here not seeking to substitute the writ of mandamus for an appeal but are asking for the writ as the *only* effective means of remedy available. If mandamus is an inappropriate remedy, *none* is available.

Section 6 of the Federal Employers' Liability Act (28 U. S. C. §56) gave these petitioners a substantial right to select the forum in which they wished their cases

to be tried. In *Boyd v. Grand Trunk Western R. Co.*, 338 U. S. 263, 70 S. Ct. 26, (1949) this court said, at page 28:

> "The right to select the forum granted in §6 is a *substantial right.*"

If District Court Judges in the Third Circuit are forced against their will to refuse to abide by the limitations of *forum non conveniens* in applying Section 1404(a) and if there is no remedy to petitioners available by mandamus, there is nothing remaining of the substantial right granted by §6.

CONCLUSION

Finally, we here do not seek mandamus against a District Court Judge who transferred or refused to transfer a case alleging that he abused his discretion. Rather, in essence, we asked the Court of Appeals to allow the District Court Judge to exercise his discretion within the principles he thought applicable—viz., within the principles of *forum non conveniens.* This the Court of Appeals refused to do. We now respectfully request this Court to state that the settled principles of *forum non conveniens* do apply in accordance with the Congressional intent, reverse the decision of the Court of Appeals and allow the district court judge to apply these principles according to his announced exercise of discretion.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 337.

October Term, 1954.

ALEXANDER NORWOOD,
Petitioner,
v.
HONORABLE WILLIAM H. KIRKPATRICK, etc.,

JOSEPH F. TUNSTALL,
Petitioner,
v.
HONORABLE WILLIAM H. KIRKPATRICK, etc.,

JOHN E. SMALLWOOD,
Petitioner,
v.
HONORABLE WILLIAM H. KIRKPATRICK, etc.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPENDIX.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND APPENDIX.

QUESTION PRESENTED FOR REVIEW.

Did the United States Court of Appeals for the Third Circuit properly deny an application for a writ of mandamus or prohibition to review the discretion exercised by a district judge who, after full consideration of extensive affidavits concerning all of the interests specified in Title 28 U. S. C. § 1404(a), had granted three motions for transfer?

STATEMENT OF THE CASE.

The petitioners each brought a suit under the Federal Employers' Liability Act in the United States District Court for the Eastern District of Pennsylvania to recover for injuries sustained in a derailment near Dillon, South Carolina. The defendant, Atlantic Coast Line Railroad Company, filed motions to transfer the actions, pursuant to Title 28 U. S. C. § 1404(a), to the United States District Court for the Eastern District of South Carolina (Florence Division), the district and division in which the accident occurred. Affidavits were filed in support of and in opposition to the transfer motions. The affidavits are set forth in the Appendix to this brief.

In his opinion granting the transfer motions (printed at pp. 32-34 of Petitioners' Brief), Chief Judge Kirkpatrick discussed the salient features of the affidavits. He was satisfied that at trial the Railroad Company would need to produce nearly twenty-four fact witnesses, at considerable expense (the defense witnesses reside chiefly in North and South Carolina, and the estimated cost of their attendance at a trial in Philadelphia is close to $5,000—Appendix, pp. 4a-5a, 9a-11a, 15a-17a, 18a-20a). On the other hand, he felt that petitioners would call, at most, only two or three of their possible passenger witnesses, with reference to the issue of liability. As to medical testimony, he believed that the railroad would need to call only some of the doctors and hospital employees who had treated petitioners during their periods of hospitalization in South Carolina (Appendix, pp. 20a-21a), whereas petitioners would need the testimony of Philadelphia and Washington physicians who had examined or attended them after their discharges from South Caroline hospitals (Appendix, pp. 24a, 28a, 30a).

Judge Kirkpatrick considered the fact that only Petitioner Norwood is a resident of the district where the suits were brought and "has a stronger case than the others with regard to the medical witnesses"—having been treated by

two physicians in Philadelphia and two in Chester, Pennsylvania (the railroad's affidavit listed eight South Carolina doctors who had attended Norwood while he was hospitalized there—Appendix, pp. 20a-21a). These factors were considered insufficient to outweight "the heavy balance of convenience in favor of the defendant in connection with the liability witnesses", particularly in view of the fact that Norwood had initially selected Chicago as an appropriate forum by instituting suit there before he commenced his suit in Pennsylvania (Petitioner Tunstall had also started suit in Chicago, and each of the petitioners had been represented by New York counsel, by Chicago counsel, and finally by Philadelphia counsel (Appendix, pp. 22a-23a).

The district judge pointed out that there were other considerations, such as the congested condition of the court calendar in the Eastern District of Pennsylvania, and stated, specifically, "I have not overlooked the weight to be given to plaintiffs' choice of a forum."

Following the filing of Judge Kirkpatrick's opinion, petitioners applied for a writ of mandamus or prohibition to restrain Judge Kirkpatrick from entering an order transferring the cases. The Court of Appeals for the Third Circuit denied the writ without opinion. Petitioners' subsequent application for a rehearing was also denied without opinion.

ARGUMENT.

The true issue raised by the petition is whether certiorari should be granted in order that this Court may review a district court judge's interlocutory exercise of the discretion vested in him by Title 28 U. S. C. § 1404(a), after a Court of Appeals has declined, through mandamus, to substitute its discretion for that of the district judge. Such a review would necessarily require this Court to weigh and evaluate all of the factors enumerated in the affidavits submitted to and considered by the district judge (see the Appendix to this brief).

Petitioners would have this Court review not the Third Circuit's decision in the instant cases, but what they assert to be its holding in *All States Freight, Inc. v. Modarelli*, 196 F. 2d 1010 (3rd Cir. 1952). They apparently believe that in this manner they can create a conflict between circuits on which to predicate the petition for certiorari. They assert that the Third Circuit is out-of-step with other circuits, arguing that it refuses to recognize plaintiff's choice of forum as a factor to be considered in granting or denying a transfer motion. But the decision from which petitioners seek relief is the refusal of the Third Circuit to reverse the exercise of discretion by the district judge, who gave appropriate consideration to the various interests stipulated in § 1404(a), including, specifically, the important factor of petitioners' choice of forum.

For this Court to grant certiorari there should be a square and irreconcilable conflict between the *decision* of the Third Circuit in the instant cases and the *decisions* of other courts of appeals or the *decisions* of this Court. Supreme Court Rule 19. No conflict in fact exists, and the petition should therefore be denied. See *Layne & Bowler Corporation v. Western Well Works, Inc.*, 261 U. S. 387, 392-393 (1923); *Wisconsin Electric Co. v. Dumore Co.*, 282 U. S. 813 (1931).

I. The Third Circuit's Interpretation of § 1404(a) Does Not Conflict With the Decisions of This Court or the Decisions of Other Circuits.

Petitioners devote their argument to an attack on the decision of the Court of Appeals for the Third Circuit in *All States Freight, Inc. v. Modarelli,* 196 F. 2d 1010 (3rd Cir. 1952), claiming (Petitioners' Brief, p. 16) that it ". . . is a mandate to district court judges to refuse to recognize plaintiff's choice of forum as a factor" to be considered in granting or denying transfer motions. Petitioners err not only in their assertion of the issue now before this Court—the propriety of reviewing the Court of Appeal's action in the instant cases *in which proper weight was given to petitioners' choice of forum by the district judge*—but also in the conclusion they seek to draw from the decision in *All States Freight, Inc. v. Modarelli, supra.* There, the district judge *denied* a motion for transfer and review of the denial was sought by mandamus. The Court of Appeals refused to issue mandamus because the district judge had "considered the interests stipulated in the statute and decided thereon" (196 F. 2d at 1012). The decision can in no way be interpreted as a mandate to district court judges to refuse to recognize the important interest of plaintiff's choice of forum. On the contrary, the Third Circuit's refusal to reverse Judge Modarelli, who had declined to disturb plaintiff's choice of forum, sustains that interest.

Petitioners refer to *Paragon-Revolute Corp. v. C. F. Pease Co.,* 120 F. Supp. 488 (D. C. Del. 1954), and *General Felt Products Co. v. Allen Industries, Inc.,* 120 F. Supp. 491 (D. C. Del. 1954), as examples of recent interpretations of *All States Freight, Inc. v. Modarelli, supra,* by district courts in the Third Circuit. So they are. In both, plaintiff's choice of forum was given weight. It is significant that petitioners fail to mention *Busch v. Reiss S. S. Co.,* 120 F. Supp. 886 (D. C. Del. 1954), cited in *General Felt Products Co. v. Allen Industries, supra,* in which the same district court, in refusing transfer, said, at p. 887:

> "I do not understand the Modarelli case to say, however, that the plaintiff's choice of forum is not a factor to be considered in the application for transfer under 1404(a) or that the conveniences of the defendant and his witnesses must not somewhat outweigh the conveniences of the plaintiff and his witnesses, together with his generally accorded privilege of choice of forum."

Similarly, Chief Judge Kirkpatrick in the instant cases considered and gave weight to petitioners' choice of forum. The fact that he did so on the authority of *All States Freight, Inc. v. Modarelli, supra,* only serves to point up the speciousness of petitioners' argument.

The Third Circuit has recognized, as have all courts, that the doctrine of *forum non conveniens* is different from § 1404(a); the former involves a dismissal of the action, the latter does not.[1] As a result of this obvious difference the Third Circuit has said that the preconceived limitations of *forum non conveniens* are not to be applied in § 1404(a) cases. It has not said that the *interests* to be considered when applying the statute differ from the interests enumerated in the celebrated *forum non conveniens* case of *Gulf Oil Corp. v. Gilbert,* 330 U. S. 501, 508-509 (1947). Some courts describe the application of § 1404(a) in terms of *forum non conveniens,* others in terms of "balance of convenience". However, the same interests are considered and, on substantially the same facts, identical results are obtained irrespective of the language employed to describe the nature of the interests considered. On the basis of the facts presented to Judge Kirkpatrick in this case, we submit, all would agree that the transfers were proper.

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1. See *All States Freight, Inc. v. Modarelli, supra,* p. 1011.

A. *The Supreme Court Has Not Held That the Doctrinal Limitations of Forum Non Conveniens Must Be Applied in § 1404(a) Transfer Cases.*

The decisions of this Court cited by petitioners do not hold that doctrinaire limitations of *forum non conveniens* must be applied in § 1404(a) transfer cases. Thus in *Ex Parte Collett*, 337 U. S. 55 (1949), the issue before this Court was the applicability of § 1404(a) to Federal Employers' Liability Act cases. The court held that under § 1404(a) relief may be had in Liability Act cases on the ground of inconvenient forum.[2]

The phrase *forum non conveniens* is a short-hand method by which to describe generally the considerations involved under § 1404(a) and the concept of an inconvenient forum. See, e.g., *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, 342 U. S. 180, 186 (1952). Although this Court has not held that the preconceived limitations of the legal doctrine of *forum non conveniens* should be applied in § 1404(a) cases, the various interests or considerations enumerated in *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 508-509 (1947), do serve to guide district judges in passing on transfer motions. Chief Judge Kirkpatrick considered and discussed those interests in the instant case.

For purposes of this application for certiorari petitioners seek to ignore the weight the district judge gave to their choice of forum. They also seem to contend that there is something unusual and different about the initial selection of forum in a Liability Act case. However, nothing in the decision of this Court in *Boyd v. Grand Trunk Western R. Co.*, 338 U. S. 263 (1949), relied upon by petitioners, supports such a contention. *Ex Parte Collett, supra*, p. 60,

2. In *Pope v. Atlantic Coast Line R. Co.*, 345 U. S. 379 (1953), the issue before the Court was the applicability of § 1404(a) to state court actions, and the holding was that it had conferred no power upon state courts. In *Wells v. Simonds Abrasive Co.*, 345 U. S. 514 (1953), the issue was one under the Full Faith and Credit Clause of the Federal Constitution, and § 1404(a) was in no way involved.

pointed out that § 6 of the Liability Act defines the proper forum; § 1404(a) deals with the right to transfer an action properly brought. "The two sections deal with two separate and distinct problems." The distinction was recognized in *Boyd v. Grand Trunk Western R. Co., supra*, p. 266, when this Court explained that nothing in *Ex Parte Collett, supra*, ". . . affects the *initial choice* of venue afforded Liability Act plaintiffs." (Emphasis supplied.) Once the first choice is made by plaintiff, § 1404(a) operates as freely and fully in Liability Act cases as in any other type of action.[3]

B. *There Is No Real Conflict Among Circuits Concerning the Interpretation of § 1404(a).*

Although there is no holding of this Court which supports petitioners' contention that § 1404(a) is subject to the limitations of the doctrine of *forum non conveniens*, three circuit court decisions superficially, at least, seem to support their contention. *Ford Motor Co. v. Ryan*, 182 F. 2d 329 (2nd Cir. 1950), *cert. denied*, 340 U. S. 851 (1950);

3. The affidavits of both sides in the district court clearly indicate that these cases present the element of "shopping around", not for a convenient forum but for one to petitioners' liking (Appendix, pp. 22a-23a, 32a-35a). Petitioners had retained different attorneys in New York, Chicago and Philadelphia. Two of them even instituted suits in Chicago. Judge Kirkpatrick recognized that petitioners had "shopped around" and, therefore, found it impossible to accept at face value their contention that Philadelphia was the most appropriate and convenient forum. Cf. *Henderson v. American Airlines, Inc.*, 91 F. Supp. 191 (S. D. N. Y. 1950). It was this very evil, so prevalent in Liability Act cases prior to § 1404(a), that the statute was designated to correct. The notes of the revisor of the Judicial Code accompanying § 1404(a) say:

> ". . . As an example of the need of such a provision, see Baltimore & Ohio R. Co. v. Kepner, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."

Nicol v. Koscinski, 188 F. 2d 537 (6th Cir. 1951); *Wiren v. Laws*, 194 F. 2d 873 (D. C. Cir. 1951), *cert. denied*, 346 U. S. 938 (1954). Basically these three decisions hold that the various interests considered in *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 508-509 (1947) are substantially the same interests to be considered in an application of § 1404(a).

However, the cases, of which *All States Freight, Inc. v. Modarelli, supra*, is one of several,[4] which say that the doctrine of *forum non conveniens* differs from § 1404(a) in no way preclude consideration of the interests enumerated in *Gulf Oil Corp. v. Gilbert, supra*, in determining the propriety of transfers under § 1404(a). On the contrary, substantially the same interests are considered. For example, in *Headrick v. Atchison, Topeka & Santa Fe R. Co.*, 182 F. 2d 305 (10th Cir. 1950) the court, although recognizing that § 1404(a) differs from the doctrine of *forum non conveniens* and perhaps, therefore, confers greater discretion on the district court, cited *Gulf Oil Corp. v. Gilbert, supra*, as a guide to determine the interests stipulated in the statute. Therefore, in many cases (including many enumerated on pp. 20-21 of Petitioners' Brief) reference is made to the *Gulf Oil Corp. v. Gilbert, supra*, and to *forum non conveniens*. Again, it should be emphasized that Judge Kirkpatrick, in the instant cases, weighed the very interests enumerated in the *Gulf Oil* case.

Judge Ryan in *Ferguson v. Ford Motor Co.*, 89 F. Supp. 45 (S. D. N. Y. 1950), in which he denied a motion for transfer (affirmed in *Ford Motor Co. v. Ryan, supra*, relied upon so heavily by petitioners), said at p. 50:

> "This Court has held that Section 1404(a) is but a codification of the doctrine of *forum non conveniens* . . . Other courts have said that it differs from *forum non conveniens* . . .

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4. See also *Amalgamated Ass'n. v. Southern Bus Lines, Inc.*, 172 F. 2d 946 (5th Cir. 1949); and *Jiffy Lubricator Co., Inc. v. Stewart-Warner Corp.*, 177 F. 2d 360 (4th Cir. 1949), *cert. denied*, 338 U. S. 947 (1950).

> "*But, differences in characterization do not necessarily lead to differences in result* . . . It is also clear that since the remedy available under Section 1404(a) —i. e., transfer—differs from and is less harsh than the remedy available under *forum non conveniens*— i. e., dismissal—the court in the course of balancing the various factors which must be examined to determine the availability of a remedy, *as set forth in the Gulf Oil case, supra,* will give different emphases to those factors . . . *To this degree a new standard can be said to have been established, although the standard would defy precise definition.*" (Emphasis supplied.) [5]

Judge Irving Kaufman of the Southern District of New York, after the Court of Appeals decision in *Ford Motor Co. v. Ryan, supra,* in his *Observations on Transfers Under Section 1404(a) of the New Judicial Code,* 10 F. R. D. 595 (1951), considered the relationship between § 1404(a) and the doctrine of *forum non conveniens.* At 10 F. R. D. 598, he said:

> "Hence some district courts have stated that 1404(a) is merely a codification of the doctrine of forum non conveniens. On the other hand other district courts have said that the section has introduced a new principle into federal procedure. *Despite these varying characterizations, there is really little disagreement among the courts as to the applicability and scope of the section. All are more or less in agreement that the remedy under 1404(a)—i. e., transfer—is less harsh than the dismissal under forum non conveniens, and hence are more prone to grant a transfer upon a showing of inconvenience.*" (Footnotes omitted and emphasis supplied.)

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5. Compare the reference to imprecise standards in Justice Jackson's dissenting opinion in *Wells v. Simonds Abrasive Co.,* 345 U. S. 514, 522 (1953), at p. 22 of Petitioners' Brief.

He then pointed out, at 10 F. R. D. 605:

> "The criteria used to determine a motion to transfer are, in most cases, those enumerated by the Supreme Court in Gulf Oil Corp. v. Gilbert, a forum non conveniens case . . ."

Careful examination of the cases listed by petitioners on pages 20 and 21 of their Brief discloses that under the facts in each case the result would have been the same in all circuits. For example, in *Nicol v. J. C. Penny Co.*, 97 F. Supp. 83 (E. D. Mich. 1951), affirmed in *Nicol v. Koscinski, supra* (which petitioners claim is in conflict with the Third Circuit's interpretation of the statute), a transfer was granted, on the basis of the interests set forth in *Gulf Oil Corp. v. Gilbert, supra,* although plaintiff was a resident of the forum and the factors favoring transfer were much less compelling than those involved in the three instant cases.[6]

The three circuit court decisions (*Ford Motor Co. v. Ryan, supra; Nicol v. Koscinski, supra;* and *Wiren v. Laws, supra*), upon which petitioners rely to support their contention that the Third Circuit's interpretation of § 1404(a) is improper, recognize that plaintiff's choice of forum is an important interest and that a bare balance of convenience in favor of defendant and his witnesses is insufficient to warrant disturbing plaintiff's choice of forum. However, petitioners studiously ignore the fact that the same recognition is accorded plaintiff's choice of forum in the Third Circuit. In the instant cases Chief Judge Kirkpatrick did ". . . not overlook the weight to be given to plaintiffs' choice of a forum." However, "the heavy bal-

6. In *Nicol v. J. C. Penny Co., supra,* defendant had ten employee witnesses who resided in or near the transferee forum (while in the instant cases defendant has some twenty-four liability and several medical witnesses), and the plaintiff and her seven witnesses resided in the forum where suit was instituted (while in the instant cases petitioners, only one of whom resides near Philadelphia, have, except for medical testimony, only two or three unimportant fact witnesses in or near Philadelphia).

ance of convenience in favor of the defendant in connection with the liability witnesses" dictated transfer. The Court of Appeals for the Third Circuit simply refused to reverse Judge Kirkpatrick's exercise of discretion.

In summary, petitioners claim that decisions of the Third Circuit interpreting § 1404(a) conflict with decisions of this Court and of other Courts of Appeal. As is so well illustrated by the refusal to disturb the district judge's discretion in the instant cases, the conflict is illusory, not real.

II. The Decisions of the Third Circuit With Respect to Whether Mandamus Will Issue to Correct a Transfer Order of the District Court Do Not Conflict With the Decisions of This Court or the Decisions of Other Circuits.

In the portion of their brief dealing with mandamus (pp. 23-27) petitioners again confine their argument to an attack on *All States Freight, Inc. v. Modarelli,* 196 F. 2d 1010 (3rd Cir. 1952), rather than the Third Circuit's refusal to reverse by mandamus Chief Judge Kirkpatrick's exercise of discretion in the instant cases. Petitioners would have this Court believe that on the authority of *All States Freight, Inc. v. Modarelli, supra,* the Third Circuit will never invoke mandamus to correct a transfer order of the district court, no matter, as they say, "how egregious its error may be" (Petitioners' Brief, p. 23). Again, they err not only in failing to meet the issue now before this Court—whether or not the denial of mandamus by the Third Circuit in the instant cases should be reviewed by certiorari—but also in the conclusion they draw from the decision in *All States Freight, Inc. v. Modarelli, supra.* There, the Third Circuit merely said that it will not grant review by mandamus, "where the district court has considered the interests stipulated in the statute and decided thereon" (p. 1012). This can only mean that if the district judge has based his order granting or denying transfer on

interests other than those enumerated in § 1404(a), or has failed to consider the interests enumerated, his action will be reviewed by mandamus.

To claim that the Third Circuit will never issue mandamus is to ignore the leading case of *Paramount Pictures, Inc. v. Rodney*, 186 F. 2d 111 (3rd Cir. 1951), *cert. denied*, 340 U. S. 953 (1951). There the Court of Appeals granted mandamus because the district judge misconstrued the statute on the question of other available fora. Although defendant was not amenable to service in the proposed transferee forum, it had, by seeking transfer, consented to suit there and so suit "might have been brought" there under § 1404(a). The district judge had based his refusal to grant a transfer on considerations not set forth in the statute.[7]

For the purpose of deciding the issue now before this Court the significant facts are that Judge Kirkpatrick clearly considered the various interests enumerated in § 1404(a), he exercised the discretion conferred upon him by § 1404(a), and the Third Circuit refused to grant mandamus. Without an opinion from the Third Circuit it is idle for petitioners to assert, with such assurance, their concept of why mandamus was denied.

A. *The Third Circuit's Decision in the Instant Cases Is Consistent With This Court's Decisions Concerning the Extraordinary Nature of Mandamus.*

Petitioners' assertion that the refusal of mandamus, here, conflicts with decisions of this Court approving man-

7. A similar situation existed in *Carr v. Donohoe*, 201 F. 2d 426 (8th Cir. 1953). Plaintiff resisted the district court's order granting transfer, on the ground that defendant was not subject to service in the transferee forum. However, since defendant had requested the transfer, and thus consented to service in the other forum, the transfer was proper. Although the court said it did not believe that mandamus was an appropriate method of seeking review of the transfer order and, accordingly, denied the petition, the decision is completely consistent with the test set forth in the cases in the other circuits discussed herein.

damus to review transfer orders is in error in two respects. First, they assume that the Court of Appeals denied mandamus as an inappropriate remedy to correct what petitioners claim was an improper transfer order: an unwarranted assumption in the absence of any opinion; and, second, this Court has not held that mandamus will lie to review a transfer order.

This Court has consistently held that mandamus should be granted most infrequently.[8] In *Ex Parte Fahey*, 332 U. S. 258 (1947), the Court said, pp. 259-260:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies . . . As extraordinary remedies, they are reserved for really extraordinary causes."

The traditional use of mandamus in the federal courts has been to confine inferior courts to the exercise of their prescribed jurisdiction or to compel them to exercise their authority when it is their duty to do so. *United States Alkali Export Ass'n., Inc. v. United States*, 325 U. S. 196, 202 (1945).

Applying to § 1404(a) this Court's delimitation of the use of mandamus, it is clear that an appellate court should refuse to review by mandamus the exercise of discretion by a district judge who has considered the interests stipulated in the statute and decided thereon. Only by failing to consider the stipulated interests or by considering other interests would a district judge transgress the confines of the jurisdiction established by § 1404(a). No such transgression was committed by Chief Judge Kirkpatrick in this case.

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8. Petitioners cite *Ex Parte Collett*, 337 U. S. 55 (1949); *Kilpatrick v. Texas & P. Ry. Co.*, 337 U. S. 75 (1949); and *U. S. v. National City Lines, Inc.*, 337 U. S. 78 (1949) for the proposition that this Court will review § 1404(a) orders by mandamus. In *Ex Parte Collett, supra*, p. 72 this Court expressly stated that it did not decide whether mandamus was an appropriate remedy. Mandamus was not granted in either the *Collett* or *Kilpatrick* cases, nor was certiorari granted in the *National City Lines* case.

The extraordinary writ of mandamus is not to be used to substitute the appellate court's discretion for that of the district judge. Petitioners recognize that an order granting or denying transfer is not appealable. Should mandamus issue when the appellate court merely disagrees with the exercise of discretion by the district judge who has considered the interests set forth in the statute, the effect would be to make appealable an interlocutory order not otherwise appealable. This Court has declared that mandamus cannot be so used to substitute for an appeal. *Roche v. Evaporated Milk Ass'n.*, 319 U. S. 21 (1943).[9]

The issue now before this Court is similar to the one presented in *Bankers Life & Casualty Co. v. Holland*, 346 U. S. 379 (1953). There, the district judge granted a transfer pursuant to 28 U. S. C. § 1406(a), and the Court of Appeals denied a petition for mandamus to vacate the transfer order. Mandamus was sought from this Court on the ground that appeal after final judgment was an ineffective and inadequate remedy. The Court, in refusing to grant mandamus, once again pointed out that mandamus is an extraordinary remedy and said, pp. 382-383:

> "If we applied the reasoning advanced by the petitioners, then every interlocutory order which is wrong might be reviewed under the All Writs Act [28 U. S. C. § 1651(a)]. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction."

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9. Certiorari will generally not be granted to review a non-appealable order. As this Court stated in *American Construction Co. v. Jacksonville, T. & K. W. Ry.*, 148 U. S. 372, 384 (1893), ". . . this court should not issue a writ of certiorari to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." For such an extraordinary situation, see *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U. S. 579 (1952).

B. *There Is No Conflict Among Circuits Concerning Availability of Mandamus With Reference to Transfer Orders.*

Any seeming conflict among circuits on the question of whether mandamus will issue to correct an order of the district court in granting or denying a motion to transfer is in the language and not the test employed. Notwithstanding differences in semantics, all circuits agree that a petition for mandamus will be denied when the district judge's exercise of discretion has been founded upon due consideration of the interests set forth in § 1404(a). A close examination of the cases cited by petitioners (Petitioners' Brief, p. 23) permits no other conclusion.

In *Ford Motor Co. v. Ryan*, 182 F. 2d 329 (2nd Cir. 1950), *cert. denied*, 340 U. S. 851 (1950), the court refused to vacate by mandamus an order denying transfer entered by the district judge after consideration of the interests stipulated in § 1404(a). The court pointed out that the district judge's action must be accepted unless it is "too wild" (Judge Frank) or "clearly erroneous" (Judge L. Hand). What is meant by "too wild" or "clearly erroneous" is apparent from *Foster-Milburn Co. v. Knight*, 181 F. 2d 949 (2nd Cir. 1950), the only case that has been found in the Second Circuit in which mandamus was granted. There, the transfer ordered was not to a "district or division where it might have been brought" (the defendant was not amenable to service in the transferee forum), and mandamus was granted because the district judge had exceeded the jurisdiction conferred upon him by the statute. Cf. *Paramount Pictures, Inc. v. Rodney*, 186 F. 2d 111 (3rd Cir. 1951), *cert. denied*, 340 U. S. 953 (1951).

In *Atlantic Coast Line R. Co. v. Davis*, 185 F. 2d 766 (5th Cir. 1950), plaintiff's action under the Federal Employers' Liability Act had been transferred pursuant to § 1404(a) from the Southern District of New York to the Southern District of Florida. Subsequently, two mistrials occurred in Florida and a third was probable. For this

reason the district judge granted plaintiff's motion for retransfer to New York. Since the district court did *not* consider the interests stipulated in § 1404(a) but founded its action on a wholly irrelevant factor, the Court of Appeals, by mandamus, vacated the transfer order.[10]

In the Seventh Circuit mandamus will not issue to vacate a transfer order when the district judge had before him all relevant evidence bearing upon the decisive factors of the convenience of parties and witnesses and decided the matter upon consideration of them. *B. Heller & Co. v. Perry*, 201 F. 2d 525, 527 (7th Cir. 1953). There, the Seventh Circuit, citing the Third Circuit decision of *Paramount Pictures, Inc. v. Rodney, supra*, for the proposition that mandamus is available to review the district judge's action, held that when the lower court considers the interests stipulated in the statute, its determination cannot be "too wild" or "clearly erroneous" in the sense these terms were used by Judges Frank and L. Hand in *Ford Motor Co. v. Ryan, supra*. However, when the district judge bases his transfer order on interests not enumerated in § 1404(a) mandamus will be granted. See *Chicago, R. I. & P. R. Co. v. Igoe*, 212 F. 2d 378 (7th Cir. 1954), where the removal of the cause from the state to the federal court was thought by the district judge to preclude the party who obtained the removal from thereafter seeking a transfer.

In *Shapiro v. Bonanza Hotel Co., Inc.*, 185 F. 2d 777 (9th Cir. 1950), the court refused to grant mandamus where the district judge denied transfer on the ground that defendant was not amenable to service in the proposed transferee forum. However, had the transfer been granted (situation obtaining in *Foster-Milburn Co. v. Knight, supra*) or had the defendant been subject to service in the transferee forum (situation obtaining in *Paramount Pic-*

10. In *In Re Illinois Cent. R. Co.*, 192 F. 2d 465, 466 (5th Cir. 1951), the Fifth Circuit pointed out that in *Atlantic Coast Line R. Co. v. Davis, supra*, it ". . . left no doubt that only in the clearest case of excess or renunciation of jurisdiction should this court issue a writ of mandamus or its correlative prohibition."

tures, Inc. v. Rodney, supra), all circuits would have granted mandamus because the district judge would have failed to confine himself to the jurisdiction prescribed in the statute.

In *Wiren v. Laws*, 194 F. 2d 873 (D. C. Cir. 1951), *cert. denied*, 346 U. S. 938 (1954), which followed the Third Circuit decision in *Paramount Pictures, Inc. v. Rodney, supra*, and the Fifth Circuit decision in *Atlantic Coast Line v. Davis, supra*, the court held that mandamus will issue "where the grounds for transferring the cause are insufficient to support the order and to bring it within the terms of the statute" (p. 874). The trial judge had considered none of the interests set out in the statute (but simply treated plaintiff's suit as a motion for new trial and transferred to the forum where the prior litigation between the parties had taken place) and, consequently, mandamus was granted.

In only five of the cases considered have petitions for mandamus been granted (*Foster-Milburn Co. v. Knight*, 2nd Cir.; *Paramount Pictures, Inc. v. Rodney*, 3rd Cir.; *Atlantic Coast Line R. Co. v. Davis*, 5th Cir.; *Chicago, R. I. & P. R. Co. v. Igoe*, 7th Cir.; and *Wiren v. Laws*, D. C. Cir.). In each the district judge failed to consider the interests stipulated by the statute or misconstrued the language of the statute with respect to other available fora. The same result would have been reached in each case in each circuit.

In concluding their argument petitioners contend (Petitioners' Brief, p. 27):

> "Nothing remains of this substantial right [to select the forum] if a District Court Judge may with impunity transfer a case and if the plaintiff has no right to a mandamus action to correct such action. The action of the District Court Judge can be arbitrary and capricious. He can refuse to consider the factors outlined in Title 28, U. S. C. 1404(a) and the plaintiff is left without any effective remedy."

There is nothing in the pronouncements of this Court, in any decision of the Third Circuit, and, particularly, in the opinion of the district judge in the instant cases upon which this contention may be founded. All circuit courts which have considered the problem conclude that mandamus will issue against a district judge who has refused to consider the factors outlined in the statute. The decisions of this Court indicate that arbitrary or capricious action on the part of the district judge would be without his prescribed jurisdiction and reviewable by mandamus.

Chief Judge Kirkpatrick in the instant cases had before him numerous affidavits dealing with all of the various factors to be weighed in disposing of the transfer motions, and he exercised his discretion thereon. His action in directing the transfers was neither arbitrary nor capricious. The Court of Appeals for the Third Circuit refused to reverse his exercise of discretion. The language of the Seventh Circuit in *B. Heller & Co. v. Perry*, 201 F. 2d 525, 527 (7th Cir. 1953), in which the court refused to reverse, by mandamus, the grant of transfer, is particularly apposite here:

> "It is apparent from what we have related that the District Judge had before him all relevant evidence bearing upon the decisive questions of the convenience of the parties and the witnesses . . . To issue these writs, in this situation, it seems to us, would be to usurp the discretionary function of the District Court."

CONCLUSION.

It is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

H. Francis De Lone,
William H. Lowery,
Barnes, Dechert, Price, Myers & Rhoads,
Attorneys for Respondent.

Appendix.

AFFIDAVITS FILED IN SUPPORT OF THE MOTIONS FOR TRANSFER.

Affidavit of M. V. Barnhill, Jr., in Alexander Norwood v. Atlantic Coast Line R. Co.

STATE OF NORTH CAROLINA,
COUNTY OF NEW HANOVER, } *ss.:*

M. V. BARNHILL, JR., being duly sworn according to law, deposes and says that he is General Solicitor of the Atlantic Coast Line Railroad Company, defendant in the above case; that he is familiar with the facts developed in the investigation of the accident upon which this case is based; and that the facts set forth in this affidavit are true and correct to the best of his knowledge, information and belief:

1. This is an action based on injuries to plaintiff, allegedly sustained while upon one of defendant's trains as a result of an accident near Dillon, South Carolina, in the Eastern District of South Carolina, Florence Division.

2. Fifteen witnesses whose presence and testimony are essential to the defense of this case reside in or near Florence, South Carolina. Eight of these witnesses are physicians who attended plaintiff for the injuries allegedly sustained in the accident upon which this action is based.

3. Nine witnesses whose presence and testimony are essential to the defense of this case reside in Rocky Mount, North Carolina, which is approximately 400 miles from Philadelphia, Pennsylvania.

4. Three witnesses whose presence and testimony are essential to the defense of this case reside in Fayetteville,

North Carolina, which is approximately 460 miles from Philadelphia, Pennsylvania.

5. Two witnesses whose presence and testimony are essential to the defense of this case reside in Richmond, Virginia, which is approximately 250 miles from Philadelphia, Pennsylvania.

6. Plaintiff was a patient for several weeks in St. Eugene Hospital, Dillon, South Carolina, where he was taken after the accident. The records of St. Eugene Hospital, with a proper custodian to identify them, are essential to the defense of this case.

7. None of the witnesses referred to above reside in or near Philadelphia, Pennsylvania.

8. All of the witnesses referred to above reside more than 100 miles from Philadelphia, Pennsylvania, and their attendance upon trial at that point could not be compelled by service of process. With respect to such witnesses who would be unwilling to attend trial at Philadelphia, the defendant would be forced to rely upon their depositions in lieu of their personal appearances before the jury and the defendant would thus lose its right to have the jury determine the credibility of those witnesses by observing their manner of testifying upon the stand.

9. Twenty-one of the witnesses referred to above are engaged in interstate commerce in the transportation of passengers, freight and mail and their attendance at a trial at Philadelphia, Pennsylvania would require the absence of such witnesses from their regular duties for several days longer than if such trial were held at Florence, South Carolina. They would be able to testify at Florence, South Carolina without serious interference with or interruption of their regular duties.

10. The cost to defendant of transporting and maintaining the witnesses essential to a defense of this case in the Eastern District of Pennsylvania would be substantial.

11. In the opinion of your affiant the convenience of the parties and witnesses, and the ends of justice, would best be served by the transfer of this case to the United States District Court for the Eastern District of South Carolina, Florence Division.

12. The docket of the United States District Court for the Eastern District of South Carolina, Florence Division, is in excellent condition, and in the event of a transfer to that jurisdiction this case could there obtain a fair, impartial and speedy trial.

[s] M. V. BARNHILL, JR.

Sworn to and subscribed before me this 8 day of January, 1954.

[s] B. B. REYNOLDS,
Notary Public.

(Seal)

My Commission Expires: Jan. 11, 1954.

Affidavit of C. F. Taliaferro in Alexander Norwood v. Atlantic Coast Line R. Co.

STATE OF NORTH CAROLINA,
COUNTY OF NEW HANOVER, } *ss.:*

C. F. TALIAFERRO, being duly sworn according to law, deposes and says that he is Chief Claims Agent of the Atlantic Coast Line Railroad Company, defendant in the above case; that he is familiar with the facts developed in the investigation of the accident upon which this case is based; that he has examined and agrees with the affidavit of M. V. Barnhill, Jr., relative to the witnesses needed in the trial of this case; that in his capacity as Chief Claims Agent for defendant he is familiar with the cost of transporting, feeding and housing witnesses; that if this case is tried in the United States District Court for the Eastern District of Pennsylvania, the minimum cost to defendant for transportation, food and lodging for the witnesses set forth in the affidavit of M. V. Barnhill, Jr., would be $3,566.84 computed as follows:

Basis of Cost

1. Transportation: Standard first-class fare and Pullman fare, lower berth, from place of residence to Philadelphia, Pennsylvania, and return.
2. Food: Five dollars per day during travel and five dollars per day for estimated five days' trial at Philadelphia, Pennsylvania.
3. Lodging: Six dollars per day for estimated five days' trial at Philadelphia, Pennsylvania.

Summary of Witnesses Set Forth in Affidavit of M. V. Barnhill, Jr.

Fifteen witnesses set forth in Paragraph 2:

Transportation	$925.80
Food	525.00
Lodging	450.00
Total	$1,900.80

Nine witnesses set forth in Paragraph 3:		
Transportation	$400.05	
Food	315.00	
Lodging	270.00	
Total		985.05
Three witnesses set forth in Paragraph 4:		
Transportation	$159.99	
Food	105.00	
Lodging	90.00	
Total		354.99
Two witnesses set forth in Paragraph 5:		
Transportation	$ 69.28	
Food	70.00	
Lodging	60.00	
Total		199.28
One witness set forth in Paragraph 6:		
Transportation	$ 61.72	
Food	35.00	
Lodging	30.00	
Total		126.72
Grand Total		$3,566.84

and that this minimum cost includes neither the loss of wages to these witnesses, which loss would have to be reimbursed by defendant, nor the cost of professional or expert witness fees.

[s] C. F. TALIAFERRO

Sworn to and subscribed before me this 7 day of January, 1954.

[s] B. B. REYNOLDS,
Notary Public.

(Seal)

My Commission Expires: Jan. 11, 1954.

Affidavit of M. V. Barnhill, Jr., in Joseph F. Tunstall v. Atlantic Coast Line R. Co.

STATE OF NORTH CAROLINA,
COUNTY OF NEW HANOVER, } *ss.:*

M. V. Barnhill, Jr., being duly sworn according to law, deposes and says that he is General Solicitor of the Atlantic Coast Line Railroad Company, defendant in the above case; that he is familiar with the facts developed in the investigation of the accident upon which this case is based; and that the facts set forth in this affidavit are true and correct to the best of his knowledge, information and belief:

1. Plaintiff, Joseph F. Tunstall, resides in the District of Columbia.

2. This action is based on injuries to the plaintiff allegedly sustained while employed as a dining car waiter on one of defendant's trains as a result of an accident near Dillon, South Carolina, in the Eastern District of South Carolina, Florence Division.

3. Seven witnesses whose presence and testimony are essential to the defense of this case reside in or near Florence, South Carolina.

4. Two witnesses, physicians who attended the plaintiff for the injuries allegedly sustained in the accident upon which this action is based and whose presence and testimony are therefore essential to the defense of this case, reside in Marion, South Carolina.

5. Nine witnesses whose presence and testimony are essential to the defense of this case reside in Rocky Mount, North Carolina, which is approximately 400 miles from Philadelphia, Pennsylvania.

6. Three witnesses whose presence and testimony are essential to the defense of this case reside in Fayetteville, North Carolina, which is approximately 460 miles from Philadelphia, Pennsylvania.

7. Two witnesses whose presence and testimony are essential to the defense of this case reside in Richmond, Virginia, which is approximately 250 miles from Philadelphia, Pennsylvania.

8. Two additional physicians whose presence and testimony are essential to the defense of this case reside in Charleston, South Carolina and in Washington, District of Columbia, which are approximately 550 miles and 135 miles respectively from Philadelphia, Pennsylvania.

9. The plaintiff was a patient at Marion County Memorial Hospital, Marion, South Carolina, where he was taken after the accident until June 1, 1953. The records of the Marion County Memorial Hospital, with a proper custodian to identify them, are essential to the defense of this case.

10. None of the witnesses referred to above and no witnesses of which your affiant has any knowledge reside in or near Philadelphia, Pennsylvania.

11. All of the witnesses referred to above reside more than 100 miles from Philadelphia, Pennsylvania and their attendance upon trial at that point could not be compelled by service of process. With respect to such witnesses who would be unwilling to attend trial at Philadelphia, the defendant would be forced to rely upon their depositions in lieu of their personal appearances before the jury and the defendant would thus lose its right to have the jury determine the credibility of those witnesses by observing their manner of testifying upon the stand.

12. Twenty-one of the witnesses referred to above are engaged in interstate commerce in the transportation of passengers, freight and mail and their attendance at a trial at Philadelphia, Pennsylvania would require the absence of such witnesses from their regular duties for several days longer than if such trial were held at Florence, South Carolina. They would be able to testify at Florence, South

Carolina without serious interference with or interruption of their regular duties.

13. The cost to defendant of transporting and maintaining the witnesses esential to a defense of this case in the Eastern District of Pennsylvania would be substantial.

13. In the opinion of your affiant the convenience of the parties and witnesses, and the ends of justice, would best be served by the transfer of this case to the United States District Court for the Eastern District of South Carolina, Florence Division.

14. The docket of the United States District Court for the Eastern District of South Carolina, Florence Division, is in excellent condition, and in the event of a transfer to that jurisdiction this case could there obtain a fair, impartial and speedy trial.

/s/ M. V. Barnhill, Jr.

Sworn to and subscribed before me this 11th day of January, 1954.

/s/ B. B. Reynolds,
Notary Public.

(Seal)

My Commission Expires: Jan. 11, 1954.

Affidavit of C. F. Taliaferro in Joseph F. Tunstall v. Atlantic Coast Line R. Co.

STATE OF NORTH CAROLINA,
COUNTY OF NEW HANOVER, } *ss.:*

C. F. Taliaferro, being duly sworn according to law, deposes and says that he is Chief Claims Agent of the Atlantic Coast Line Railroad Company, defendant in the above case; that he is familiar with the facts developed in the investigation of the accident upon which this case is based; that he has examined and agrees with the affidavit of M. V. Barnhill, Jr. relative to the witnesses needed in the trial of this case; that in his capacity as Chief Claims Agent for defendant he is familiar with the cost of transporting, feeding and housing witnesses; that if this case is tried in the United States District Court for the Eastern District of Pennsylvania, the minimum cost to defendant for transportation, food and lodging for the witnesses set forth in the affidavit of M. V. Barnhill, Jr. would be $2,849.53 computed as follows:

Basis of Cost

1. Transportation: Standard first-class fare and Pullman fare, lower berth, from place of residence to Philadelphia, Pennsylvania, and return.

2. Food: Five dollars per day during travel and five dollars per day for estimated five days' trial at Philadelphia, Pennsylvania.

3. Lodging: Six dollars per day for estimated five days' trial at Philadelphia, Pennsylvania.

Summary of Witnesses Set Forth in Affidavit of M. V. Barnhill, Jr.

Seven witnesses set forth in Paragraph 3:

Transportation	$379.33
Food	245.00
Lodging	210.00
Total	$834.33

Two witnesses set forth in Paragraph 4:

Transportation	$106.88
Food	70.00
Lodging	60.00
Total	$236.88

Nine witnesses set forth in Paragraph 5:

Transportation	$348.30
Food	315.00
Lodging	270.00
Total	$933.30

Three witnesses set forth in Paragraph 6:

Transportation	$139.98
Food	105.00
Lodging	90.00
Total	$334.98

Two witnesses set forth in Paragraph 7:

Transportation	$ 57.78
Food	70.00
Lodging	60.00
Total	$187.78

Two witnesses set forth in Paragraph 8:

Transportation	$ 78.82	
Food	65.00	
Lodging	60.00	
Total		$203.82

One witness set forth in Paragraph 9:

Transportation	$ 53.44	
Food	35.00	
Lodging	30.00	
Total		$118.44
Grand Total		$2,849.53

and that this minimum cost includes neither the loss of wages to these witnesses, which loss would have to be reimbursed by defendant, nor the cost of professional or expert witness fees.

/s/ C. F. TALIAFERRO

Sworn to and subscribed before me this 11th day of January, 1954.

/s/ B. B. REYNOLDS,
Notary Public.

(Seal)

My Commission Expires: Jan. 11, 1954.

Affidavit of M. V. Barnhill, Jr., in John E. Smallwood v. Atlantic Coast Line R. Co.

STATE OF NORTH CAROLINA,
COUNTY OF NEW HANOVER, } *ss.:*

M. V. Barnhill, Jr., being duly sworn according to law, deposes and says that he is General Solicitor of the Atlantic Coast Line Railroad Company, defendant in the above case; that he is familiar with the facts developed in the investigation of the accident upon which this case is based; and that the facts set forth in this affidavit are true and correct to the best of his knowledge, information and belief:

1. Plaintiff, John E. Smallwood, resides in the District of Columbia.

2. This action is based on injuries to the plaintiff allegedly sustained while employed as a dining car cook on one of defendant's trains as a result of an accident near Dillon, South Carolina, in the Eastern District of South Carolina, Florence Division.

3. Ten witnesses whose presence and testimony are essential to the defense of this case, including three physicians who attended the plaintiff for the injuries allegedly sustained in the accident upon which this action is based, reside in or near Florence, South Carolina, which is approximately 460 miles from Philadelphia, Pennsylvania.

4. Nine witnesses whose presence and testimony are essential to the defense of this case reside in Rocky Mount, North Carolina, which is approximately 400 miles from Philadelphia, Pennsylvania.

5. Three witnesses whose presence and testimony are essential to the defense of this case reside in Fayetteville, North Carolina, which is approximately 460 miles from Philadelphia, Pennsylvania.

6. Two witnesses whose presence and testimony are essential to the defense of this case reside in Richmond, Virginia, which is approximately 250 miles from Philadelphia, Pennsylvania.

7. Three additional physicians whose presence and testimony are essential to the defense of this case reside in Washington, District of Columbia, which is approximately 135 miles from Philadelpia, Pennsylvania.

8. The plaintiff was a patient at McLeod Infirmary, Florence, South Carolina, where he was taken after the accident until April 25, 1953. The records of the McLeod Infirmary, with a proper custodian to identify them, are essential to the defense of this case.

9. None of the witnesses referred to above and no witnesses of which your affiant has any knowledge reside in or near Philadelphia, Pennsylvania.

10. All of the witnesses referred to above reside more than 100 miles from Philadelphia, Pennsylvania and their attendance upon trial at that point could not be compelled by service of process. With respect to such witnesses who would be unwilling to attend trial at Philadelphia, the defendant would be forced to rely upon their depositions in lieu of their personal appearances before the jury and the defendant would thus lose its right to have the jury determine the credibility of those witnesses by observing their manner of testifying upon the stand.

11. Twenty-one of the witnesses referred to above are engaged in interstate commerce in the transportation of passengers, freight and mail and their attendance at a trial at Philadelphia, Pennsylvania would require the absence of such witnesses from their regular duties for several days longer than if such trial were held at Florence, South Carolina. They would be able to testify at Florence, South Carolina without serious interference with or interruption of their regular duties.

12. The cost to defendant of transporting and maintaining the witnesses essential to a defense of this case in the Eastern District of Pennsylvania would be substantial.

13. In the opinion of your affiant the convenience of the parties and witnesses, and the ends of justice, would best be served by the transfer of this case to the United States District Court for the Eastern District of South Carolina, Florence Division.

14. The docket of the United States District Court for the Eastern District of South Carolina, Florence Division, is in excellent condition, and in the event of a transfer to that jurisdiction this case could there obtain a fair, impartial and speedy trial.

/s/ M. V. Barnhill, Jr.

Sworn to and subscribed before me this 3rd day of February, 1954.

/s/ R. N. Getty,
(Seal) *Notary Public.*
My Commission Expires: January 12, 1956.

Affidavit of C. F. Taliaferro in John E. Smallwood v. Atlantic Coast Line R. Co.

STATE OF NORTH CAROLINA,
COUNTY OF NEW HANOVER, } *ss.:*

C. F. Taliaferro, being duly sworn according to law, deposes and says that he is Chief Claims Agent of the Atlantic Coast Line Railroad Company, defendant in the above case; that he is familiar with the facts developed in the investigation of the accident upon which this case is based; that he has examined and agrees with the affidavit of M. V. Barnhill, Jr. relative to the witnesses needed in the trial of this case; that in his capacity as Chief Claims Agent for defendant he is familiar with the cost of transporting, feeding and housing witnesses; that if this case is tried in the United States District Court for the Eastern District of Pennsylvania, the minimum cost to defendant for transportation, food and lodging for the witnesses set forth in the affidavit of M. V. Barnhill, Jr. would be $2,993.11 computed as follows:

Basis of Cost

1. Transportation: Standard first-class fare and Pullman fare, lower berth, from place of residence to Philadelphia, Pennsylvania, and return.

2. Food: Five dollars per day during travel and five dollars per day for estimated five days' trial at Philadelphia, Pennsylvania.

3. Lodging: Six dollars per day for estimated five days' trial at Philadelphia, Pennsylvania.

Summary of Witnesses Set Forth in Affidavit of M. V. Barnhill, Jr.

Ten witnesses as set forth in Paragraph 3:		
Transportation	$541.90	
Food	350.00	
Lodging	300.00	
Total		$1,191.90
Nine witnesses as set forth in Paragraph 4:		
Transportation	$343.30	
Food	315.00	
Lodging	270 90	
Total		$ 933.30
Three witnesses as set forth in Paragraph 5:		
Transportation	$139.98	
Food	105.00	
Lodging	90.00	
Total		$ 334.98
Two witnesses as set forth in Paragraph 6:		
Transportation	$ 57.78	
Food	70.00	
Lodging	60.00	
Total		$ 187.78
Three witnesses as set forth in Paragraph 7:		
Transportation	$ 45.96	
Food	90.00	
Lodging	90.00	
Total		$ 225.96
One witness as set forth in Paragraph 8:		
Transportation	$ 54.19	
Food	35.00	
Lodging	30.00	
Total		$ 119.19
Grand Total		$2,993.11

and that this minimum cost includes neither the loss of wages to these witnesses, which loss would have to be reimbursed by defendant, nor the cost of professional or expert witness fees.

/s/ C. F. TALIAFERRO

Sworn to and subscribed before me this 2nd day of February, 1954.

/s/ R. N. GETTY,
Notary Public.
My Commission Expires: Jan. 12, 1956.

Affidavit of M. V. Barnhill, Jr., in Alexander Norwood v. Atlantic Coast Line R. Co., Joseph F. Tunstall v. Atlantic Coast Line R. Co., and John E. Smallwood v. Atlantic Coast Line R. Co.

STATE OF NORTH CAROLINA,
COUNTY OF NEW HANOVER, } *ss.:*

M. V. BARNHILL, JR., being duly sworn according to law, deposes and says that he is General Solicitor of the Atlantic Coast Line Railroad Company, defendant in the above cases; that he is familiar with the facts developed in the investigation of the accident out of which these causes of action arose and with the representation of the respective plaintiffs; and that the facts set forth in this affidavit are true and correct to the best of his knowledge, information, and belief:

1. The presence and testimony of the following twenty-four fact witnesses are essential to the defense of these three cases, and defendant expects to call all of them at the trial of each of these three cases:

Members of Crew of the Derailed Train:

T. M. Maxwell, Conductor, 708 Pender St., Rocky Mount, N. C.

B. B. Sweeney, Engineman, 618 Buena Vista, Rocky Mount, N. C.

W. L. Bond, Baggagemaster, 1530 S. Church St., Rocky Mount, N. C.

W. B. Rudisill, Flagman, 2524 W. Grace St., Richmond, Va.

E. James, Porter, 1008 N. 8th Street, Richmond, Va.

Members of Crew of Extra Train 307 North, the train standing in the siding at the time and place of the derailment, who will testify concerning the functioning of the switches and signals a few minutes before the derailment occurred:

W. W. Carson, Conductor, 1530 S. Church St., Rocky Mount, N. C.

W. D. Fountain, Engineman, 808 Wester Avenue, Rocky Mount, N. C.

W. N. Smith, Flagman, 621 Norfolk St., Rocky Mount, N. C.

James Ray, Brakeman, 225 Hendrix St., Rocky Mount, N. C.

Conductors of trains which passed the point of derailment shortly before the accident, who will testify concerning the operation of the signal equipment and switches only a short time before the accident:

T. R. Bennett, Richmond, Va.

C. T. Collins, Richmond, Va.

Witnesses who inspected the derailed cars and locomotives and who will testify concerning their findings:

J. C. Bryant, Foreman, Pamplico Road, Florence, S. C.

J. C. Wallace, Car Inspector, 827 W. Rowan St., Fayetteville, N. C.

Levermen-Telegraphers at Control Tower, Maple, S. C., who will testify concerning the operation of the switches and signal equipment and other automatic facilities involved in the derailment:

O. P. Raiford, 105 S. 12th St., Dillon, S. C.

E. S. Bethea, Dillon, S. C.

Witnesses who will testify with respect to the construction and maintenance of the signal equipment involved in the derailment:

S. J. Davis, Signal Engineer, Wilmington, N. C.

W. P. Robinson, Signal Inspector, Florence, S. C.

N. D. Ford, Signal Maintainer, Dillon, S. C.

J. R. McLeod, Section Master, Dillon, S. C., who will testify concerning trackage maintenance in the area where the derailment occurred.

J. S. Webb, Chief Engineer, Communication and Signaling, Wilmington, N. C., who will testify concerning the signal system used on defendant's lines.

R. L. Groover, Chief Engineer, Wilmington, N. C., who will testify concerning the construction, maintenance and condition of defendant's track.

H. G. Moore, Asst. General Superintendent, Motive Power and Equipment, Wilmington, N. C., who will testify concerning the condition of defendant's cars and coaches.

F. D. Sineath, Asst. General Superintendent, Motive Power and Equipment, Wilmington, N. C., who will testify concerning the condition of defendant's locomotives.

G. G. Lynch, Asst. to General Superintendent, Motive Power and Equipment, Wilmington, N. C., who will testify as to the speed tape and the interpretation thereof.

2. The presence and testimony of the following medical witnesses are essential to the defense of these cases, and defendant expects to call all of those listed at the trial of each respective case:

Norwood v. Atlantic Coast Line

Dr. James A. McLeod, 140 S. Irby St., Florence, S. C.

Dr. W. Thad Bethea, Jr., Latta, S. C.

Dr. J. P. Cain, St. Eugene Hospital, Dillon, S. C.

Dr. O. R. Russell, St. Eugene Hospital, Dillon, S. C.

Dr. Wayne Reeser, St. Eugene Hospital, Dillon, S. C.

Dr. L. D. Lide, Jr., St. Eugene Hospital, Dillon, S. C.

Dr. J. O. Wanner, St. Eugene Hospital, Dillon, S. C.

Dr. Swift C. Black, St. Eugene Hospital, Dillon, S. C.

Custodian of Records, St. Eugene Hospital, Dillon, S. C.

Tunstall v. Atlantic Coast Line

Dr. E. M. Dibble, Marion, S. C.

Dr. Luther C. Martin, 82 Rutledge Ave., Charleston, S. C.

Dr. William L. Cheezem, Jr., Academy St., Marion, S. C.

Dr. J. A. Talbot, 1835 Eye St., N. W., Washington 6, D. C.

Dr. E. M. McPeak, 915 19th St., N. W., Washington 6, D. C.

Custodian of Records, Marion County Memorial Hospital, Marion, S. C.

Smallwood v. Atlantic Coast Line

Dr. George R. Dawson, 129 W. Cheves St., Florence, S. C.

Dr. C. H. Kingsbury, Florence, S. C.

Dr. J. M. Lide, Florence, S. C.

Dr. J. A. Talbot, 1835 Eye St., N. W., Washington 6, D. C.

Dr. E. M. McPeak, 915 19th St., N. W., Washington 6, D. C.

Dr. H. L. Phillips, Washington, D. C.

Custodian of Records, McLeod Infirmary, 107-147 W. Cheves St., Florence, S. C.

3. Plaintiff Norwood has been represented by the following attorneys with regard to the subject matter of his instant suit:

Gair & Gair, 84 Williams St., New York 38, N. Y. (Notice of representation was received from them in May, 1953; these attorneys ceased to represent Norwood in June, 1953).

Weinberg & Lewin, 570 Seventh Ave., New York 18, N. Y. (Notice of representation was received from them in June, 1953).

Irving N. Stenn, 100 N. LaSalle St., Chicago, Ill. (Notice of Attorney's Lien was received from him in June, 1953).

Richter, Lord and Farage, 121 S. Broad St., Phila., Pa. (Notice of representation was received from them in August, 1953).

Irving Stenn started suit on behalf of Norwood against the Atlantic Coast Line on August 3, 1953 in the Circuit Court of Cook County, Illinois as of No. 53 C. 11891. A Special Appearance and a Motion to Quash the Summons on ground of lack of jurisdiction in personam was filed on defendant's behalf. The suit was dismissed on December 4, 1953, on motion of the plaintiff. Richter, Lord and Farage started the instant suit (Norwood) on September 21, 1953.

4. Plaintiff Tunstall has been represented by the following attorneys with regard to the subject matter of his instant suit:

Weinberg & Lewin, 570 Seventh Ave., New York 18, N. Y. (Notice of representation was received from them in June, 1953).

Irving N. Stenn, 100 N. LaSalle St., Chicago, Ill. (Notice of Attorney's Lien was received from him in June, 1953).

Richter, Lord and Farage, 121 S. Broad St., Phila., Pa. (Notice of representation was received from them in November, 1953).

Irving N. Stenn started suit on behalf of Tunstall against the Atlantic Coast Line on July 31, 1953, in the Circuit Court of Cook County, Illinois, as of No. 53 C. 11860. A Special Appearance and a Motion to Quash the Summons on ground of lack of jurisdiction in personam was filed on defendant's behalf. The suit was dismissed on December 4, 1953, on motion of the plaintiff. Richter, Lord and Farage started the instant suit (Tunstall) on December 17, 1953.

5. Plaintiff Smallwood has been represented by the following attorneys with regard to the subject matter of his instant suit:

Weinberg & Lewin, 570 Seventh Avenue, New York 18, N. Y. (Notice of representation was received from them in June, 1953).

Irving N. Stenn, 100 N. LaSalle Street, Chicago, Ill. (Notice of Attorney's Lien was received from him in June, 1953).

Richter, Lord and Farage, 121 S. Broad St., Phila., Pa. (Notice of representation was received in January, 1954).

Richter, Lord and Farage started the instant suit (Smallwood) on January 19, 1954.

/s/ M. V. Barnhill, Jr.
M. V. Barnhill, Jr.

Sworn to and subscribed before me this 19th day of April, 1954.

/s/ R. N. Getty,
(Seal) *Notary Public.*
My commission expires January 12, 1956.

AFFIDAVITS FILED IN OPPOSITION TO THE MOTIONS FOR TRANSFER.

Affidavit of Charles A. Lord in Alexander Norwood v. Atlantic Coast Line R. Co.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

CHARLES A. LORD, being duly sworn according to law, deposes and says that the following facts are true and correct to the best of his knowledge, information and belief. The plaintiff, Alexander Norwood, lives in Chester, Pennsylvania. He has been treated by Dr. John T. Farrell, a resident of the City of Philadelphia; Dr. James Lehman, a resident of the City of Philadelphia; Dr. Albert E. Bothe, a resident of the City of Philadelphia; Dr. F. Lafenus Hutchins, a resident of Chester, Pennsylvania; Dr. K. J. Crothers, a resident of Chester, Pennsylvania. All of these doctors have offices in the cities of their residences. All of the above listed doctors will testify on the condition of this plaintiff and have announced their willingness to testify in Philadelphia, and will be necessary to the trial of this case. It is further averred that the plaintiff was confined to the Fitzgerald Mercy Hospital, Darby, Pennsylvania, and the Chester Hospital, Chester, Pennsylvania. It is further averred that this case is a case where liability is based upon the fact that the train was derailed when it went through, at a high speed, an interlocked switch, the points of which were unlocked and not in proper position. It is further averred that there can be little question of liability, and witnesses for the defendant on the liability question are not necessary. It is further averred that many of the passengers aboard this train live in the vicinity of Philadelphia and New York, and "Exhibit A" attached hereto, gives a list of some of the many passengers who live in this area. If a contest on liability is attempted, many of these passengers would be necessary as witnesses for the plaintiff as

to the speed and movement of the train. It is further averred that the plaintiff is without funds, destitute and has no present employment. The cost of transporting, lodging and feeding the above medical, and if necessary liability witnesses, would be prohibitive. It is further averred that Chester, Pennsylvania is 20 miles from Philadelphia, Pennsylvania, and Florence, South Carolina is 527 miles from Chester, Pennsylvania. It is further averred that in the opinion of your affiant, for the convenience of parties and witnesses and in the interests of justice, this case should not be transferred to the United States District Court for the Eastern District of South Carolina, Florence Division, or to any other United States District Court.

/s/ CHARLES A. LORD
Charles A. Lord

Sworn to and subscribed before me this 10 day of March 1954.

/s/ NANCY SHAW,
Notary Public.
My Commission Expires February 2, 1957.

"EXHIBIT A"

Frank Blindt	Maplewood, New Jersey
Drucella Blindt	Maplewood, New Jersey
Mrs. A. H. Anderson	Long Island, New York
Samuel Cohn	Brooklyn, New York
Melvin Yadley	Newark, New Jersey
Archie Korngut	Newark, New Jersey
John Grimes Far	Rockaway, New York
Helen Grimes Far	Rockaway, New York
Charles Brannon	Brooklyn, New York
J. E. Wideman	New York City, New York
Fannie Forman	Bronx, New York
Sam Forman	Bronx, New York
Fannie Blumenthal	Bronx, New York
Joseph Grubman	Bronx, New York
Rebecca Heimowitz	Bronx, New York
Lillian Homer	Staten Island, New York
Dora Lehrman	Forest Hills, New York
Mrs. Tanba Lendar	Brooklyn, New York
Sophia Mercer	Manhasset, Long Island, New York
Abe Reis	Brooklyn, New York
Freida Reis	Brooklyn, New York
Nettie Shuman	Brooklyn, New York
Iris Rita Shuman	Brooklyn, New York
Nettie Shuman	Brooklyn, New York
Iris Rita Shuman	Brooklyn, New York
Anne Toback	Brooklyn, New York
Leo Winick	Brooklyn, New York
Nettie Winick	Brooklyn, New York
Mary R. Yeager	Plainfield, New Jersey
Abraham Bursick	Brooklyn, New York
Rae Zagon	New York City, New York
Belle Lipman	Brooklyn, New York
Joseph Movis	Brooklyn, New York

Sadie Movis	Brooklyn, New York
William Conner	Lakewood, New Jersey
Suzanne Bichsel	Queens Village, New York
Matilda Scalese	Jackson Heights, New York
Rose Kilner	Brooklyn, New York
Laura Sapp	Philadelphia, Pennsylvania
Antoinette Marino	Long Island, New York
Eldora Slaughter	Brooklyn, New York
Eloise Sullivan	Nyack, New York
Alma K. Doe	Mt. Vernon, New York

Affidavit of Charles A. Lord in Joseph F. Tunstall v. Atlantic Coast Line R. Co.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

CHARLES A. LORD, being duly sworn according to law, deposes and says that the following facts are true and correct to the best of his knowledge, information and belief. The plaintiff, John Tunstall, is a resident of the District of Columbia and has been treated by Dr. Donald Jones, a resident of the City of Philadelphia; Dr. John T. Farrell, a resident of the City of Philadelphia, both of whom practice and have offices in the City of Philadelphia; by Dr. Williams and Dr. Robinson, both of whom live and practice in the District of Columbia; and was confined in the Freedmen Hospital in Washington, D. C. for treatment. All of the above listed doctors will testify on the condition of this plaintiff, and have announced their willingness to testify in Philadelphia, and will be necessary to the trial of this case. It is further averred that this case is a case where liability is based upon the fact that the train was derailed when it went through, at a high speed, an interlocked switch, the points of which were unlocked and not in proper position. It is further averred there can be little question of liability and witnesses for the defendant on the liability question are not necessary. It is further averred that many of the passengers aboard this train live in the vicinity of Philadelphia and New York, and "Exhibit A" attached hereto, gives a list of some of the many passengers who live in this area. If a contest on liability is attempted many of these passengers would be necessary as witnesses for the plaintiff as to the speed and movement of the train. It is further averred that the plaintiff is without funds, destitute and has no present employment. The cost of transporting, lodging and feeding the above medical, and if necessary liability witnesses, would be prohibitive. It is further averred that it is 135 miles between Philadelphia and Washington,

D. C., while it is 412 miles between Washington, D. C. and Florence, South Carolina. It is further averred that in the opinion of your affiant, for the convenience of parties and witnesses and in the interests of justice this case should not be transferred to the United States District Court for the Eastern District of South Carolina, Florence Division, or to any other United States District Court.

/s/ CHARLES A. LORD
Charles A. Lord

Sworn to and subscribed before me this 10 day of March 1954.

/s/ NANCY SHAW,
Notary Public.
My Commission Expires February 2, 1957.

["Exhibit A" contains list of same names and addresses as are attached to the affidavit of Charles A. Lord in Alexander Norwood v. Atlantic Coast Line R. Co.]

Affidavit of Charles A. Lord in John E. Smallwood v. Atlantic Coast Line R. Co.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

CHARLES A. LORD, being duly sworn according to law, deposes and says that the following facts are true and correct to the best of his knowledge, information and belief. The plaintiff, John E. Smallwood, is a resident of the District of Columbia and has been treated by Dr. Hugh Gray, a resident of the District of Columbia; Dr. Robinson, a resident of the District of Columbia; Dr. Philip Johnson, a resident of the District of Columbia; Dr. Vasilios S. Lambros, a resident of the District of Columbia; Dr. Wilkinson, a resident of the District of Columbia; and was confined at the Emergency Hospital in the District of Columbia. It is further averred that all of the above doctors have offices in the District of Columbia. All of the above listed doctors will testify on the condition of this plaintiff, and have announced their willingness to testify in Philadelphia, and will be necessary to the trial of this case. It is further averred that this case is a case where liability is based upon the fact that the train was derailed when it went through, at a high speed, an interlocked switch, the points of which were unlocked and not in proper position. It is further averred that there can be little question of liability and witnesses for the defendant on the liability question are not necessary. It is further averred that many of the passengers aboard this train live in the vicinity of Philadelphia and New York, and "Exhibit A" attached hereto, gives a list of some of the many passengers who live in this area. If a contest on liability is attempted many of these passengers would be necessary as witnesses for the plaintiff as to the speed and movement of the train. It is further averred that the plaintiff is without funds, destitute and has no present employment. The cost of transporting, lodging and feeding the above medical, and if necessary liability

witnesses, would be prohibitive. It is further averred that it is 135 miles between Philadelphia and Washington, D. C., while it is 412 miles between Washington, D. C. and Florence, South Carolina. It is further averred that in the opinion of your affiant, for the convenience of parties and witnesses and in the interests of justice, this case should not be transferred to the United States District Court for the Eastern District of South Carolina, Florence Division, or to any other United States District Court.

/s/ CHARLES A. LORD
Charles A. Lord

Sworn to and subscribed before me this 10 day of March 1954.

/s/ NANCY SHAW,
Notary Public.
My Commission Expires February 2, 1957.

["Exhibit A" contains list of same names and addresses as are attached to the affidavit of Charles A. Lord in Alexander Norwood v. Atlantic Coast Line R. Co.]

Affidavit of James P. Mozingo, III, in Alexander Norwood v. Atlantic Coast Line R. Co., Joseph F. Tunstall v. Atlantic Coast Line R. Co., and John E. Smallwood v. Atlantic Coast Line R. Co.

STATE OF SOUTH CAROLINA,
COUNTY OF DARLINGTON,

Personally appeared before me James P. Mozingo, III., who, being duly sworn says that he is a practicing attorney at law, with his office located in Darlington, S. C.; that he has been duly admitted to practice in the District Court of the United States for the Eastern District of South Carolina; that his practice is principally personal injury or tort law on behalf of the injured person; that as such he is very vitally concerned with the size of verdicts in the courts of the State of South Carolina and including the Federal Courts in South Carolina; that although his practice in the District Court of the United States for the Eastern District of South Carolina is had principally in the Columbia and Florence Divisions, he has handled cases in the other divisions of the said Eastern District; that he resides in Darlington, S. C., which is located ten (10) miles from Florence, S. C. where the trials in the Florence Division of the Eastern District of South Carolina are held; that the largest verdict that he recalls as ever being rendered since 1949 by a jury in a personal injury case in the Florence Division was in the amount of Twenty Thousand ($20,000.00) Dollars, rendered in 1953, and prior to 1949 was one rendered prior to World War II in the amount of Fifteen Thousand ($15,000.00) Dollars for very severe personal injuries; that according to his information and belief, there have been tort claim cases wherein judgment at a greater amount has been rendered; that from his experience in the actual trial of law suits in the Eastern District of South Carolina, he finds that verdicts for personal injuries suffered by a Negro are not as high as verdicts for a White person, all other things being equal; that the Florence Divi-

sion of the United States District Court for the Eastern District of South Carolina is known to him as a very low verdict court and for that reason he tries his Federal Court cases in one of the other Divisions whenever possible.

/s/ James P. Mozingo, III
James P. Mozingo, III

Sworn to before me this 3 day of May, 1954.

/s/ Nancy Alice Bowie (L.S.)
Notary Public for South Carolina.

Affidavit of John L. Nettles in Alexander Norwood v. Atlantic Coast Line R. Co., Joseph F. Tunstall v. Atlantic Coast Line R. Co., and John E. Smallwood v. Atlantic Coast Line R. Co.

STATE OF SOUTH CAROLINA }
COUNTY OF DARLINGTON }

PERSONALLY appeared before me JOHN L. NETTLES, who, being first duly sworn, says that he is an attorney-at-law, duly admitted to practice before the Supreme Court of the State of South Carolina, and in the District Court of the United States for the Eastern District of South Carolina; that he practices in Darlington, South Carolina, which is located ten miles from Florence, South Carolina; that his practice is such that he is actively engaged in litigation in the District Court for the Eastern District of South Carolina, principally in the Columbia and Florence Divisions; that Darlington is located within the Florence Division.

That deponent has made an investigation concerning the size of jury verdicts in personal injury cases rendered in the Florence Division; that from his own knowledge he knows of no verdict rendered in said Division of sufficient size to be worthy of mention.

That deponent contacted several of the outstanding law firms handling matters in the Florence Division and according to the information received, which deponent believes to be true, the largest verdict rendered in the Florence Division in a personal injury action was in the amount of Twenty Thousand ($20,000.00) Dollars.

That Deponent at said time of making inquiries concerning the largest verdict also attempted to determine the largest verdict for a white person and the largest verdict for a colored person, and while deponent was unable to determine the exact figures in this connection, he discovered that verdicts generally are higher for white persons than for colored persons, all other things being equal.

That the Florence Division is noted throughout the Eastern District of South Carolina as an extremely low verdict center, notwithstanding the fact that jurors for the Florence Division are drawn from the same territorial limits as are jurors for the other Divisions comprising the Eastern District of South Carolina.

/s/ JOHN L. NETTLES
John L. Nettles

Sworn to before me this 3 day of May, 1954.

/s/ NANCY ALICE BOWIE (Seal)
Notary Public for South Carolina.

Affidavit of Franklin F. Balthaser in Alexander Norwood v. Atlantic Coast Line R. Co., Joseph F. Tunstall v. Atlantic Coast Line R. Co., and John E. Smallwood v. Atlantic Coast Line R. Co.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

FRANKLIN F. BALTHASER, being duly sworn according to law, deposes and says that he is a resident and citizen of Philadelphia, Pennsylvania, and that he has been engaged in railroading all of his adult life for a period in excess of 37 years; that in the course of his work he has been a fireman, brakeman, conductor, assistant yard master, yard master, general yard master, and assistant train master for the Reading Company, and that in the course of those years he has hired, trained, supervised, and examined literally thousands of employees; that he is fully familiar with all of the aspects of railroading in both yard and road service; that he is familiar with tower operations, switching operations, and the maintenance of tracks and right of ways; that he is familiar with causes of derailments, the usual and customary procedure of inspection of equipment and roadway involved in derailments.

Your deponent further avers that he has read the affidavit of M. V. Barnhill, Jr., who is general solicitor of the Atlantic Coast Line Railroad Company, filed in the above entitled cases setting forth the reasons for producing twenty-four fact witnesses whose names are set forth inter alia in said affidavit. These witnesses are hereinafter discussed in order to determine whether such persons are necessary witnesses to prove the cause of the said derailment.

1. Your deponent further avers that he has also read the report of the I. C. C. which states:

> "We find that this accident was caused by the movement of train No. 2 at high speed over an interlocked

switch, the points of which were unlocked and not in proper position, the reason for which cannot be definitely determined at this time."

2. The accident occurred because the switch at which the derailment occurred was not locked as is required when trains are moving at a high speed over the tracks. Admittedly the investigations conducted by the I. C. C. and by the defendant itself will establish that this was a through train moving at a high speed.

3. The testimony of the members of the crew of the derailed train can do nothing more than establish that fact and prove nothing as to the switch.

4. The testimony of the members of the crew of extra train 307 North is clearly irrelevant as theirs was merely a movement at slow speed over the switch. Their testimony can be of no significance as they had nothing to do with lining up the switch, and the fact that they did not derail when passing over the switch is not important because the testimony given before the official board indicates that they moved at a very slow speed which could not cause a derailment.

5. The testimony of conductors of other prior trains is completely irrelevant as the switch had been lined up for their movements long before the movement in question took place and other intervening movements had taken place prior to the movement when the accident actually occurred. The switch naturally had been unlocked after later movements had been made.

6. Witnesses who inspected the derailed cars and locomotives are obviously unimportant as how badly the cars were damaged or what point they were damaged as a result of the derailment would not prove whether or not the switch was unlocked or why. This can establish nothing as to the cause of the accident nor as to the nature of the injuries. The injuries speak for themselves and can only be corro-

borated by the doctors' testimony. The cause of the accident was due to the fact that the switch was not locked. Nothing on the cars or loco.notive can prove or disprove that fact. This is merely a matter of record which was noted as the movements were made in either direction and they would be merely interpreting records that speak for themselves and can be produced here in Philadelphia. Whether the switch was locked or not is something with which they have nothing to do.

7. Witnesses who will testify with respect to construction and maintenance of the signal equipment are likewise of no importance inasmuch as their testimony only goes to the method of construction and maintenance of signal equipment involved in derailments. Inasmuch as the accident happened not because of any defect in signals but rather because someone failed to lock the switch, it is of no significance.

8. J. R. McLeod is the Section Master and his testimony concerning trackage maintenance will not be important as it only goes to the question of maintenance of the switch.

9. J. S. Webb's testimony is obviously unimportant since the accident was due to the failure to lock the switch and testimony on signal system is irrelevant and not probative of the sole issue on liability.

10. The same is true of the testimony of R. L. Goover, H. G. Moore and F. D. Sineath, who are all men who will testify concerning locomotives, cars and coaches and the construction and maintenance and condition of the tracks.

11. The testimony of G. G. Lynch explaining the speed tape in an effort to establish perhaps that the train did not run as fast as was indicated in the I. C. C. report would probably not be very probative in view of the fact that the I. C. C. has already found that the train was going 90 miles an hour at the time of the accident.

12. Your deponent further avers that this accident could only have resulted because an important switch was unlocked. Said switch was on a main line over which heavy traffic of large trains of cars travel at speeds of 90 miles an hour. Said switch is required to be carefully locked so as to prevent its coming open by reason of the speeds at which traffic moved over it. Whether it was locked, or if locked, why it became unlocked, can be testified to only by the one witness whose duty it was to lock it and keep it locked.

Your deponent further avers that in the course of an investigation into an accident such as this, I, in my duty as assistant train master would never call the above enumerated witnesses as they could not possibly add any information of any value to inform me of the cause of such a derailment, which admittedly was "an unlocked switch".

(s) FRANKLIN F. BALTHASER,
Franklin F. Balthaser

Sworn to and subscribed before me this 5th day of May, 1954.

/s/ NANCY SHAW,
Notary Public.
My Commission Expires February 2, 1957.

Office - Supreme Court, U. S.
FILED
FEB 10 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

No. 337.

October Term, 1954.

ALEXANDER NORWOOD, JOSEPH F. TUNSTALL, and JOHN E. SMALLWOOD,

Petitioners,

v.

HONORABLE WILLIAM H. KIRKPATRICK, Etc.,

Respondent.

BRIEF FOR RESPONDENT.

H. FRANCIS DELONE,
WILLIAM H. LOWERY,
BARNES, DECHERT, PRICE, MYERS & RHOADS,
13th Floor Packard Building,
Philadelphia 2, Pennsylvania,
Attorneys for Respondent.

International, 236 Chestnut St., Phila. 6, Pa.

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IN THE

Supreme Court of the United States

No. 337.

October Term, 1954.

ALEXANDER NORWOOD, JOSEPH F. TUNSTALL, AND JOHN E. SMALLWOOD,
Petitioners,

v.

HONORABLE WILLIAM H. KIRKPATRICK, ETC.,
Respondent.

BRIEF FOR RESPONDENT.

QUESTIONS PRESENTED FOR REVIEW.

I. Where, in the exercise of his discretion under Title 28 U. S. C. § 1404(a), a district judge concludes that a transfer would serve the convenience of parties and witnesses and the interest of justice, should the transfer be ordered without regard to the limitations thought to have been applicable to dismissals under the doctrine of *forum non conveniens?*

II. Is the extraordinary writ of mandamus available to review a district court's interlocutory exercise of discretion in granting a motion for transfer under Title 28 U. S. C. § 1404(a) where the court gave due weight to the interests specified by the statute?

STATEMENT OF THE CASE.

Petitioners brought suits under the Federal Employers' Liability Act in the United States District Court for the Eastern District of Pennsylvania to recover for injuries sustained in a derailment near Dillon, South Carolina. The defendant, Atlantic Coast Line Railroad Company, filed motions under Title 28 U. S. C. §1404(a) to transfer the actions to the United States District Court for the Eastern District of South Carolina (Florence Division), the district and division in which the accident occurred. Chief Judge Kirkpatrick, in the exercise of the discretion conferred by Section 1404(a), granted the transfer motions (R. 14).[1]

In his opinion Judge Kirkpatrick discussed the salient features of the affidavits which were filed in support of and in opposition to the transfer motions (R. 12-14).[2] He found that the Railroad Company would need to produce, at considerable expense, nearly twenty-four witnesses concerning the issue of liability (R. 13).[3] The defense witnesses reside chiefly in North and South Carolina, and the estimated cost of their attendance at trial in Philadelphia is close to $5,000.[4] On the other hand, he observed that peti-

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1. His opinion granted the motions and directed the submission of appropriate orders for transfer which were duly submitted. No formal orders transferring the cases have as yet been entered.

2. All of the affidavits are set forth in the Appendix to Respondent's Brief in Opposition to Petition for Writ of Certiorari, pp. 1a-39a.

3. Most of these witnesses testified in three actions, arising out of the same derailment, which were tried in the United States District Court for the Eastern District of South Carolina during the February Term, 1954. *Lynch v. Atlantic Coast Line R. R.*, Civil Action No. 3933; *Heimowitz v. Atlantic Coast Line R. R.*, Civil Action No. 3931; *Fields v. Atlantic Coast Line R. R.*, Civil Action No. 3727.

4. See Appendix to Respondent's Brief in Opposition to Petition for Writ of Certiorari, pp. 4a-5a, 9a-11a, 15a-17a, 18a-20a.

tioners would need to call, at most, only two or three of their possible passenger witnesses with reference to the speed of the train (R. 13).[5] As to medical testimony, he believed that the Railroad Company would need to call some of the more than a dozen doctors and hospital employees who had treated petitioners in South Carolina (R. 13) and recognized that petitioners would need the testimony of Washington and Philadelphia physicians who had examined or attended petitioners after their discharge from South Carolina hospitals (R. 14). He pointed out that Petitioners Smallwood and Tunstall are residents of Washington, D. C., and that their Washington physicians would have to leave their practice to attend a trial in either Philadelphia or South Carolina (R. 14).

Chief Judge Kirkpatrick concluded that there was a "heavy balance of convenience in favor of the defendant in connection with the liability witnesses" (R. 14). He considered the congested condition of the court calendar in the Eastern District of Pennsylvania and made allowance for "the weight to be given to the plaintiffs' choice of a forum" (R. 13-14). He remarked that Petitioner Norwood, the only resident of the district where the suits were brought, had a stronger case than the other two with regard to medical witnesses (R. 14) but found this insufficient to outweigh the heavy balance in favor of transfer with respect to liability witnesses, particularly in view of the fact that Norwood had initially selected Chicago as an appropriate and convenient forum by instituting suit there prior to his suit in Philadelphia (R. 14).[6]

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5. Substantially all of petitioners' list of suggested witnesses reside in New York. Appendix to Respondent's Brief in Opposition to Petition for Writ of Certiorari, pp. 24a-27a.

6. Norwood originally instituted suit against the Railroad Company in Chicago and maintained that action for some months after bringing the present suit in Philadelphia (R. 14). Tunstall had also started suit in Chicago. Each petitioner had been represented by New York counsel, by Chicago counsel, and finally by Philadelphia counsel. Appendix to Respondent's Brief in Opposition to Petition for Writ of Certiorari, pp. 22a-23a.

Following the filing of Judge Kirkpatrick's opinion granting the transfer motions, petitioners applied for writs of mandamus or prohibition to restrain the entry of an order transferring the cases (R. 1-6). The Court of Appeals for the Third Circuit denied the writs and a subsequent application for rehearing, without opinion (R. 7-8, 20-21). This Court granted certiorari on November 8, 1954 (R. 22).

SUMMARY OF ARGUMENT.

I. Title 28 U. S. C. § 1404(a) authorizes a district court, in its discretion, to transfer any civil action from the district in which it is brought to another district "for the convenience of parties and witnesses, in the interest of justice." Concluding that the factors enumerated in the statute warranted it, the district judge, in his discretion, directed a transfer. He based his action on the terms of the statute, rather than on what he described as the "stringent requirements" of the doctrine of *forum non conveniens*. Since the statute authorizing transfers is clear, it must be taken to mean what it says and resort may not be had to the reviser's note or the legislative history in order to read into the statute limitations which Congress has not ex-expressed. Furthermore, the history of the legislation, the circumstances leading up to its enactment, and the views of its draftsmen demonstrate that Congress intended the statute to be applied without regard to any preconceived limitations. This Court's decision in *Ex Parte Collett*, 337 U. S. 55 (1949), establishes that the statute means what it says and that transfer is available in situations where dismissal could not be obtained because of *forum non conveniens*. The transfer remedy is less drastic than dismissal and, therefore, was not intended to be subject to the same restrictions. The statute is remedial and must be liberally construed in the interest of efficient administration of justice.

II. Mandamus is an extraordinary remedy reserved for extraordinary situations. If it is used as a substitute for an appeal from interlocutory orders, the policy against piecemeal appeals will be defeated. Mandamus is not available to review the discretion of a district judge exercised in conformity with the provisions of Section 1404(a). The transfer orders in the instant cases were consistent not only

with the criteria established by Section 1404(a) but also with the standards derived from the doctrine of *forum non conveniens*. The applications for mandamus, which would hamper the effective operation of Section 1404(a), were properly denied as mere attempts to review the district judge's discretion.

ARGUMENT.

I. Title 28 U. S. C. § 1404(a) Grants to District Courts a Discretionary Power to Transfer Civil Actions for the Convenience of Parties and Witnesses and in the Interest of Justice Without Regard to Limitations Thought to Be Derived from Forum Non Conveniens.

In his opinion the respondent, Chief Judge Kirkpatrick, discussed the facts submitted in support of and in opposition to the motions for transfer involved in these cases. He considered the weight to be given to petitioners' choice of forum, the congested condition of the court calendar in the Eastern District of Pennsylvania, the fact that the only petitioner who resided in that district had previously instituted suit in Chicago, and the conflicting conveniences of defendant's medical witnesses in South Carolina and petitioners' medical witnesses in Washington, D. C., and Philadelphia. He found a "heavy balance of convenience in favor of the defendant in connection with the liability witnesses" (R. 14) and concluded that "the balance of convenience in all three cases is sufficiently in favor of the defendant to make the transfer proper" (R. 12). Accordingly, he exercised the discretion accorded to him by Title 28 U. S. C. § 1404(a) and granted the transfer motions.

He stated that the cases could not properly be transferred "if the stringent requirements of the doctrine of forum non conveniens found in the decisions of the Supreme Court prior to the statute" (R. 12) were applied. In directing the transfer without regard to his concept of those requirements, he followed the holding of the Court of Appeals for the Third Circuit in *All States Freight, Inc. v. Modarelli*, 196 F. 2d 1010, 1011 (3d Cir. 1952), that the words of Section 1404(a) "should be considered for what they say, not with preconceived limitations derived from the *forum non conveniens* doctrine".

The language of the statute is clear.[7] In concise and unequivocal language, it establishes the circumstances under which the discretion to transfer may be exercised, as follows [Title 28 U. S. C. § 1404(a)]:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Congressional intent must be determined primarily from the language of the statute itself. *Magnano Co. v. Hamilton*, 292 U. S. 40, 46-47 (1934). Where the statutory language is clear, there is no need to refer to extraneous guides such as legislative history. *Ex Parte Collett*, 337 U. S. 55, 61 (1949); *Wilbur v. United States*, 284 U. S. 231, 237 (1931). As this Court said in *Helvering v. City Bank Farmers Trust Co.*, 296 U. S. 85, 89 (1935):

> "We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports where there can be no doubt of the meaning of the words used."

In order to impose unexpressed limitations on the discretion to transfer granted by Congress, petitioners would create ambiguity where none exists. They assert that since the statute "*says nothing one way or the other concerning the limitations of forum non conveniens*" it is not clear and free from ambiguity in this respect.[8] Although disclaiming

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7. As the court said in *Hayes v. Chicago, R. I. & P. R. R.*, 79 F. Supp. 821, 826 (D. Minn. 1948), holding that Section 1404(a) applied to actions under the Federal Employers' Liability Act:

> *"We do not find it necessary to indulge in any discussion of statutory construction . . . The statute is direct, clear, and free from any ambiguity. Its terms are broad and without any limitation."* (Emphasis supplied.)

8. Petitioners' Brief, p. 21.

any purpose "to make words mean something different from what they say", they would read into the statute limitations in no way suggested by its terms.[9] Such "ambiguity" may not be created, where none exists, in order to make an opportunity for statutory construction. *United States v. Missouri Pacific R. R.*, 278 U. S. 269, 277 (1929).

Although the language of Section 1404(a) is clear, its legislative history may be examined to confirm the meaning conveyed by the words used. As was said in *United States v. Missouri Pacific R. R.*, 278 U. S. 269, 278 (1929):

> ". . . where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed. . . .
>
> *"But the reasons for and the significant circumstances leading up to the enactment may be noticed in confirmation of the meaning conveyed by the words used."* (Emphasis supplied.)

Petitioners claim that in Section 1404(a) Congress did nothing more than adopt "the established, well recognized, and clearly delineated doctrine of *forum non conveniens*".[10] Their claim is at odds with the reasons for and circumstances leading up to enactment of the statute. Section 1404(a) was incorporated into the second draft of the revised Code in 1945, before this Court had even determined, in *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501 (1947), and *Koster v. Lumbermens Mutual Casualty Co.*, 330 U. S. 518 (1947), that the doctrine of *forum non conveniens* could be applied

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9. *Ibid.*

10. Petitioners' Brief, pp. 10, 22.

in federal court proceedings.[11] As later stated in *United States v. National City Lines*, 334 U. S. 573, 578, 581 (1948), "the non-statutory doctrine commonly, though not too accurately, labeled *forum non conveniens*" involves a "vague and discretionary power".[12] When they wrote Section 1404(a), in 1945, the draftsmen of the Code could hardly have regarded it as adopting a "clearly delineated doctrine", since the "vague and discretionary power" was not established until two years later, when this Court decided *Gulf Oil Corp. v. Gilbert, supra.*

Section 1404(a) appears in an act entitled "An Act to revise, codify, and enact into law" Title 28 of the United States Code.[13] This Court pointed out, in *Ex Parte Collett*, 337 U. S. 55, 61 (1949), that the legislation revises as well as codifies,[14] and held that Section 1404(a) applies to cases

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11. See Moore, Commentary on the Judicial Code, ¶ 0.03(29), pp. 205-207 (1949 ed.). This Court discussed the legislative history of Title 28 U. S. C., including Section 1404(a), in considerable detail in *Ex Parte Collett*, 337 U. S. 55, 63-71 (1949). It pointed out that the initial appearance of Section 1404(a) was in the second draft of the Code, adopted in May of 1945, and that the text of this section of the Code remained unchanged from that time until the date of final adoption, on June 25, 1948. The reviser's note to Section 1404(a), on which petitioners place much reliance, also made its first appearance in May of 1945 in language substantially the same as the reviser's note accompanying this section at the time of its adoption.

12. As Paxton Blair observed in his article *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 Col. L. Rev. 1, 2 (1929), the doctrine of *forum non conveniens* is not really a doctrine but a factual situation—the factual situation of an inconvenient forum. See, for example, the use of the term in *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U. S. 180, 186 (1952). In *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 508 (1947), it was said that the doctrine "leaves much to the discretion of the court" and that "the combination and weight of factors requisite to given results are difficult to forecast or state". Justice Black, in his dissent, observed (p. 516) that the discretion exercisable under the doctrine is "broad and indefinite".

13. Act of June 25, 1948, 62 Stat. 869.

14. Both of the House reports and the Senate report referred to the bill as a revision. H. R. Rep. No. 2646, 79th Cong., 2nd Sess.

(so-called special venue actions) not subject to dismissal under the doctrine of *forum non conveniens*. Therefore, Section 1404(a) is among those sections of the Judicial Code that revised, rather than codified, existing law. It is remedial in nature and should be liberally construed. *Stewart v. Kahn*, 11 Wall. 493, 504 (U. S. 1870).

Petitioners rely on the reviser's note which accompanies Section 1404(a) to support their contention that it is subject to the limitations of *forum non conveniens*. The reviser's note states:

> "Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, *permitting transfer* to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see Baltimore & Ohio R. Co. v. Kepner, 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act in New York, although the accident occurred and the employee resided in Ohio. *The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so.*" (Emphasis supplied.)

The statement that the statute was drafted *in accordance with* the doctrine of *forum non conveniens* does not mean that the statute merely *codifies* that doctrine. The doctrine of *forum non conveniens* involves dismissal; Section 1404(a) provides only for transfer. The statute was

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1 (1946); H. R. Rep. No. 308, 80th Cong., 1st Sess. 1 (1947); S. Rep. No. 1559, 80th Cong., 2nd Sess. 1 (1948).

In the hearings before the Senate, Congressman Devitt, who was a member of the House committee which considered the bill, explained that the bill revised as well as codified. Hearings before Senate committee on H. R. 3214, 80th Cong., 2nd Sess. 18 (1948). And when the bill was debated on the Senate floor any thought that it was merely a codification was specifically corrected by Senator Donnell, chairman of the judiciary subcommittee which considered the Code. 94 Cong. Rec. 7928 (1948).

drafted "in accordance with the doctrine of forum non conveniens" in the sense that the considerations of convenience of parties and witnesses, and the interest of justice which are specified as the basis for transfer are the same as the considerations involved in deciding whether or not to dismiss because of *forum non conveniens.*[15] The last sentence of the note expresses the legislative purpose served by the concise language of the statute.

On the basis of the reviser's note, petitioners seek to read into the statute words which Congress has not expressed. A comparable attempt was rebuffed in *Pope v. Atlantic Coast Line R. R.*, 345 U. S. 379 (1953). There it was argued that the reference in the note to the *Kepner* case was effective to confer upon state courts the power to enjoin their residents from prosecuting Liability Act suits in foreign jurisdictions. The argument was rejected because the statute, by its terms, applies only to the federal courts. By the same token, the reference in the reviser's note to "the doctrine of forum non conveniens" cannot be said to limit the discretionary power to transfer granted by the clear language of Section 1404(a).

Particularly in light of the painstaking care with which the Judicial Code was revised, the words of Section 1404(a) must be taken to mean what they say. As this Court said in *Ex Parte Collett*, 337 U. S. 55, 65-66 (1949):

> "This was scarcely hasty, ill-considered legislation. To the contrary, it received close and prolonged study. Five years of Congressional attention supports the Code. And from the start, Congress obtained the most eminent expert assistence available. The spadework was entrusted to two lawbook-publishing firms, the staffs of which had unique experience in statutory codification and revision. They formed an advisory

15. In his "Preface to Title 28, U. S. C. A.", p. vi, Judge Maris, chairman of the Judicial Conference committee on revision of the Judicial Code, refers to Section 1404(a) as "authorizing the transfer of a civil action upon the ground of forum non conveniens". See also discussion *infra* at pp. 19-20.

committee, including distinguished judges and members of the bar, and obtained the services of special consultants. Furthermore, an advisory committee was appointed by the Judicial Conference."

The views of the experts who assisted Congress in revising the Code confirm the plain meaning of Section 1404(a). Two special consultants, Professor James William Moore and Judge Alexander Holtzoff, advised the committee in matters of federal procedure.[16] W. W. Barron was engaged as chief reviser.[17] Judge John J. Parker, senior circuit judge of the Court of Appeals for the Fourth Circuit, served as judicial consultant to the advisory committee, and Circuit Judge Maris, of the Third Circuit, was Chairman of the Judicial Conference committee on revision of the Judicial Code.[18]

Section 1404(a) appeared in the second draft of the Code as a result of Professor Moore's proposal of March 1945, and was ultimately enacted without any change.[19] When he appeared before the House subcommittee considering the Code Professor Moore pointed out certain important changes.[20] Speaking of venue he said:[21]

> "Venue provisions have not been altered by the revision. *Two changes of importance have, however, been made.* Improper venue is no longer grounds for dismissal of an action in the Federal courts. Instead the district court is to transfer the case to the proper venue. See section 1406. *And section 1404 introduces an element of convenience which gives the court the*

16. H. R. Rep. No. 2646, 79th Cong., 2nd Sess. 3 (1946); H. R. Rep. No. 308, 80th Cong., 1st Sess. 3 (1947).

17. *Ibid.*

18. *Ibid.*

19. Moore, *Commentary on the Judicial Code*, ¶ 0.03(29), pp. 205-206 (1949 ed.).

20. Hearings before subcommittee of Committee of the Judiciary of the House on H. R. 2055, 80th Cong., 1st Sess. 27 et seq. (1947).

21. *Id.*, p. 29.

> *power to transfer a case for the convenience of parties and witnesses to another district. Both of these changes were in line with modern State practice. . . .*" (Emphasis supplied.)

He made no reference to Section 1404(a) as a codification of the doctrine of *forum non conveniens*. On the contrary, he explained the transfer remedy as being "in line with modern State practice". In fact, it was not until after his testimony that this Court decided, in the *Gulf Oil* case, that federal courts could dismiss actions because of *forum non conveniens*.

In his *Commentary on the Judicial Code*, ¶ 0.03(29), p. 202 (1949 ed.), Professor Moore discusses the need for Section 1404(a). He refers to "forum shopping" by plaintiffs in actions under the Federal Employers' Liability Act, "in the hope of a larger verdict or for some other reason unrelated to a prompt and impartial trial" and explains how the Code sought to correct this evil, saying (p. 203):

> "A sensible treatment was to refrain from narrowing the choice of venue or from attempting to restrict the developed principles as to when a defendant is amenable to service of process, but *to give the district court the power to exercise a broad discretion in the light of all relevant factors and, where these warranted, to transfer, not dismiss, to a proper and more convenient forum. Subsection (a) of § 1404 has done this.*" (Emphasis supplied.)

Recognizing the relationship between a motion under Section 1404(a) and the doctrine of *forum non conveniens*, he places the latter in proper perspective, stating (pp. 208-209):

> "The motion calls for the exercise of a sound discretion by the district court. . . . [He then points out the factors generally to be considered, as set forth by Justice Jackson in *Gulf Oil Corp. v. Gilbert*, 330

U. S. 501, 508-509 (1947).] But it should be recalled that Justice Jackson was dealing with forum non conveniens at a time when, if applied, it resulted in a *dismissal* of the action, while under § 1404 it now results in a transfer. *As a consequence courts may now properly utilize the doctrine more freely than it was proper to do when dismissal resulted.*" (Emphasis supplied in part.)

In the same vein, Judge Holtzoff, the advisory committee's other special consultant on federal procedure, and Chief Reviser Barron state:[22]

> "Each application for transfer, on the ground of convenience of parties and witnesses presents an individual problem, the solution of which depends on circumstances peculiar to the litigation, and wide latitude is afforded the court for the exercise of its sound discretion. *The discretion to be exercised is broader than the discretion exercised under the doctrine of forum non conveniens.*" (Emphasis supplied.)

As Judge Holtzoff said in *United States v. E. I. Du Pont De Nemours & Co.*, 83 F. Supp. 233 (D. D. C. 1949), at page 233:

> "*This provision* [*§ 1404(a)*] *introduced a new principle into Federal judicial procedure.* It is a comprehensive, general statute applicable to all civil actions without exception. The innovation is salutary, as it enables the courts to make desirable adjustments as to places of trial, and puts plaintiffs and defendants more nearly on a plane of equality in those situations in which an action may be brought in any one of several districts. Previously, the final choice of the jurisdiction lay entirely with the plaintiff. This result obviously involved an element of unfairness, which the new statute endeavors to meet." (Emphasis supplied.)

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22. 1 Barron & Holtzoff, *Federal Practice and Procedure*, pp. 56-57 (1954 Supp.).

Similarly, Chief Judge Parker, judicial consultant to the advisory committee, said, in *Jiffy Lubricator Co., Inc. v. Stewart-Warner Corp.*, 177 F. 2d 360, 362 (4th Cir. 1949), *cert. denied*, 338 U. S. 947 (1950):

> "A dismissal in application of that [forum non conveniens] or any other principle puts an end to the action and hence is final and appealable. An order transferring it to another district does not end but preserves it as against the running of the statute of limitations and for all other purposes. *The notion that 28 U. S. C. A. § 1404(a) was a mere codification of existing law relating to forum non conveniens is erroneous. It is perfectly clear that the purpose of this section of the Revised Judicial Code was to grant broadly the power of transfer for the convenience of parties and witnesses, in the interest of justice, whether dismissal under the doctrine of forum non conveniens would have been appropriate or not.*" (Emphasis supplied.)

Judge Maris, Chairman of the Judicial Conference Committee on revision of the Judicial Code, shares the views of the other draftsmen of the Code. He joined in the unanimous opinion of the Court of Appeals for the Third Circuit, sitting *en banc*, in *All States Freight, Inc. v. Modarelli*, 196 F. 2d 1010, 1011 (3d Cir. 1952), where the court (in an opinion by Judge Goodrich) said:

> "*The forum non conveniens doctrine is quite different from Section 1404(a).* That doctrine involves the dismissal of a case because the forum chosen by the plaintiff is so completely inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else. It is quite naturally subject to careful limitation for it not only denies the plaintiff the generally accorded privilege of bringing an action where he chooses, but makes it possible for him to lose out completely, through the running of the statute of limitations in the forum finally deemed appropriate. *Section 1404(a) avoids this latter danger. Its words*

of forum is a real hardship, or an imposition on the court" (p. 948). Although holding that dismissal under *forum non conveniens* was improper, it remanded the case for consideration of the propriety of transfer under Section 1404(a), saying (p. 948):

> "Transfer is a less drastic matter than dismissal, for it involves no loss of time or pleading or costs; and no doubt a broader discretion may be exercised in ordering it."

Jiffy Lubricator Co., Inc. v. Stewart-Warner Corp., 177 F. 2d 360, 362 (4th Cir. 1949), *cert. denied*, 338 U. S. 947 (1950), is to the same effect. Chief Judge Parker's opinion (quoted in part *supra* at p. 16) stressed the difference between dismissal and transfer, and concluded that Section 1404(a) grants a broad power to transfer which may be invoked without regard to the doctrine of *forum non conveniens*.

In the very recent case of *In re Josephson*, — F. 2d — (1st Cir. December 23, 1954—not yet reported), the differences between the statute and the doctrine of *forum non conveniens* were again explained. The court concluded that, since Section 1404(a) is not a mere codification of the doctrine of *forum non conveniens*, a transfer may be granted whether or not dismissal under the doctrine of *forum non conveniens* would have been appropriate.

Petitioners rely chiefly on *Ford Motor Co. v. Ryan*, 182 F. 2d 329 (2d Cir. 1950), *cert. denied*, 340 U. S. 851 (1950). Judge Frank, who wrote the majority opinion in that case, held that the district court had not abused its discretion in refusing to order a transfer. He believed that Section 1404(a) did not alter the standards previously embodied in the doctrine of *forum non conveniens* and relied on language in the *forum non conveniens* case of *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 508 (1947), that "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed". Judge Swan

concurred solely on the basis that the court lacked power to review a refusal to transfer by writ of mandamus. Chief Judge Learned Hand concurred "solely upon the ground that" the venue statute involved "gives to a plaintiff a privilege which a defendant must overcome by more than a bare balance of convenience" (p. 332). Judge Frank's opinion represents his views alone and cannot be said to express the opinion of the court as a whole. Relying on the *Ford Motor Co.* case and on the reviser's note petitioners would rewrite Section 1404(a) to permit transfers only if the *overwhelming* convenience of the parties and witnesses and the *overwhelming* interest of justice were served thereby. Even if that case and the reviser's note could be said to lend support to their contention, the insertion of the word "overwhelming" in the unambiguous language of the statute would represent the clearest sort of judicial legislation.

Petitioners quote portions of the opinions in *Nicol v. Koscinski*, 188 F. 2d 537 (6th Cir. 1951), and *Wiren v. Laws*, 194 F. 2d 873 (D. C. Cir. 1951), *cert. denied*, 346 U. S. 938 (1954), and list a large number of district court decisions as supporting their attempt to limit the clear language of Section 1404(a). Basically these cases hold that the various interests enumerated in *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 508-509 (1947), are substantially the same as the interests to be considered under Section 1404(a). Accordingly, there are frequent references to *forum non conveniens* in these Section 1404(a) cases. Some courts describe the application of the statute in terms of *forum non conveniens*, others in terms of "balance of convenience". However, as Judge Irving Kaufman of the Southern District of New York points out in his *Observations on Transfers Under Section 1404(a) of the New Judicial Code*, 10 F. R. D. 595, 598 (1951) (written after the decision of the court of appeals of his circuit in *Ford Motor Co. v. Ryan, supra*):

> "Despite these varying characterizations, there is really little disagreement among the courts as to the applicability and scope of the section. All are more

> or less in agreement that the remedy under 1404(a)—i. e. transfer—is less harsh than the dismissal under forum non conveniens, and hence are more prone to grant a transfer upon a showing of inconvenience."

The decisions upon which petitioners rely recognize that plaintiff's choice of forum is an important factor to be considered, under Section 1404(a), so that a bare balance of convenience in favor of defendant and his witnesses is insufficient to warrant disturbing plaintiff's choice of forum. Petitioners' claim that the Third Circuit's decision in *All States Freight, Inc. v. Modarelli*, 196 F. 2d 1010 (3d Cir. 1952), "is a mandate to district court judges to refuse to recognize the plaintiff's choice of forum as a factor"[24] in considering a motion for transfer is completely unjustified. In the *Modarelli* case, the district court had denied a motion for transfer and the court of appeals refused to issue mandamus because the district court had "considered the interests stipulated in the statute and decided thereon" (p. 1012). Thus plaintiff's choice of forum was sustained, and nothing in the opinion can be taken as a direction to district courts to ignore the important interest of plaintiff's choice of forum. Rather, as a district court in the Third Circuit has said in refusing transfer [in *Busch v. Reiss S. S. Co.*, 120 F. Supp. 886, 887 (D. Del. 1954)]:

> "I do not understand the Modarelli case to say, however, that the plaintiff's choice of forum is not a factor to be considered in the application for transfer under 1404(a) or that the conveniences of the defendant and his witnesses must not somewhat outweigh the conveniences of the plaintiff and his witnesses, together with his generally accorded privilege of choice of forum."

In the instant cases Chief Judge Kirkpatrick stated that he had "not overlooked the weight to be given to the

24. Petitioners' Brief, p. 15.

plaintiffs' choice of a forum" but found that "the heavy balance of convenience in favor of the defendant in connection with the liability witnesses" dictated transfer (R. 13, 14). Thus, even if petitioners were correct in their contention concerning the meaning of the *Modarelli* case, there would be no reason to question the transfers in the instant cases as having failed to give weight to plaintiffs' choice of forum.

Chief Judge Kirkpatrick examined the facts in the instant cases in the light of the interests stipulated in Section 1404(a), without qualifying the clear meaning of the statute by any judicial "gloss" derived from *forum non conveniens*. After careful consideration of all the pertinent factors (which are substantially the same under Section 1404(a) or under *forum non conveniens*), he exercised his discretion in favor of the transfer.

Apparently recognizing the weakness of their attempt to circumscribe the district court's discretion with limitations thought to be derived from the doctrine of *forum non conveniens*, petitioners go beyond that doctrine and seek to bring into this case interests which not only have no place under Section 1404(a), but were rejected by this Court when it applied the doctrine of *forum non conveniens* in *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501 (1947). They assert that verdicts are not as high in the transferee forum (South Carolina) as in Philadelphia.[25] Factors which lead to "forum shopping", such as the anticipation of higher jury verdicts, are irrelevant not only in considering transfers under Section 1404(a),[26] but also in deciding dismissals under the doctrine of *forum non conveniens*. *Gore v. United States Steel Corp.*, 15 N. J. 301, 312-313, 104 A. 2d 670, 676-

25. Petitioners' Brief, p. 3, p. 17 n. 1.

26. See *Henderson v. American Airlines, Inc.*, 91 F. Supp. 191 (S. D. N. Y. 1950), and Kaufman, *Observations on Transfers Under Section 1404(a) of the New Judicial Code*, 10 F. R. D. 595, 607 (1951). As the Seventh Circuit said in *Chicago, R. I. & P. R. R. v. Igoe*, 212 F. 2d 378, 382 (7th Cir. 1954):

> ". . . we cannot presume that a trial will proceed other than fairly in any federal forum in which venue exists."

677, *cert. denied,* 348 U. S. 861 (1954). In the *Gulf Oil* case, the argument was made that dismissal under the doctrine of *forum non conveniens* would prejudice plaintiff because jurors in the convenient forum (Virginia) were unaccustomed to dealing with sums of the size claimed in damages while New York jurors would not be staggered by such sums. This contention was rejected by the Court, which said (330 U. S. 501, 510):

> "This unproven premise that jurors of New York live on terms of intimacy with $400,000 transactions is not an assumption we easily make. Nor can we assume that a jury from Lynchburg and vicinity would be 'staggered' [by the sum] . . . . The net of this is that we cannot say the District Court was bound to entertain a provincial fear of the provincialism of a Virginia jury."

Petitioners also contend that there is something unusual and different about the initial selection of forum in cases brought under the Federal Employers' Liability Act. Nothing in the decision of this Court in *Boyd v. Grand Trunk Western R. R.,* 338 U. S. 263 (1949), relied upon by petitioners, supports such a contention. The holding in *Ex Parte Collett,* 337 U. S. 55, 60 (1949), is flatly to the contrary. This Court there pointed out that Section 6 of the Liability Act defines the proper forum and Section 1404(a) deals with the right to transfer an action properly brought. "The two sections deal with two separate and distinct problems" (p. 60).[27] The reviser's note accom-

27. Substantially the same argument as petitioners make herein was made in *Conley v. Pennsylvania R. R.,* 87 F. Supp. 980, 981 (S. D. N. Y. 1950), in which the court said:

> *"This court rejects the interpretation placed upon the Boyd case by plaintiff's counsel. The Boyd case did not involve the application of Section 1404(a).* The question there merely involved the validity of an agreement made by the employee wherein he agreed in advance that if he ever brought suit against his employer, that a choice would be made of the specified districts in the agreement for the venue of the action. Such an agreement the Supreme Court held was invalid." (Emphasis supplied.)

panying Section 1404(a) and the broad language of the statute demonstrate that the first choice made by plaintiff does not exempt him from the power of the court, after due consideration of the interests stipulated in the statute, to transfer the case to a place more suitable for trial.

Subsequent to the decision holding that Section 1404(a) applied to Liability Act cases [*Ex Parte Collett, supra*], and subsequent to decisions holding that Section 1404(a) is not subject to the limitations of *forum non conveniens* [*Amalgamated Ass'n v. Southern Bus Lines, Inc.*, 172 F. 2d 946 (5th Cir. 1949); and *Jiffy Lubricator Co., Inc. v. Stewart-Warner Corp.*, 177 F. 2d 360 (4th Cir. 1949), *cert. denied*, 338 U. S. 947 (1950)], no less than nine bills were introduced in Congress to exempt Liability Act cases from the operation of Section 1404(a).[28] All were disapproved by the Committee on Venue and Jurisdiction of the Judicial Conference of the United States and none was ever reported out of the House Committee on the Judiciary.[29] In seeking special treatment for Liability Act cases, not only would petitioners have this Court reverse its holding in *Ex Parte Collett;* they would also have it do, by judicial fiat, what Congress has refused to do.

Petitioners have "shopped around", not for a convenient forum but for one to their liking. Before retaining Philadelphia counsel and commencing the instant cases they had retained different attorneys in New York and Chicago and two of them had even instituted suits in Chicago.[30] Recognizing this, Judge Kirkpatrick found it impossible to accept at face value the contention that Philadelphia was the appropriate and convenient forum (R. 14).

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28. H. R. 7585, H. R. 7636, H. R. 7640, H. R. 7642, H. R. 7841, H. R. 7868, H. R. 7885, H. R. 7893, and H. R. 8019, all 81st Cong., 2nd Sess. (1950).

29. Report of the Judicial Conference of the United States, September Session, 1951, Committee on Venue and Jurisdiction, p. 28.

30. Appendix to Respondent's Brief in Opposition to Petition for Writ of Certiorari, pp. 22a-23a.

"Forum shopping" in the hope of obtaining higher jury verdicts, so prevalent in Liability Act cases prior to Section 1404(a), was the very evil that the statute was designed to correct. See Moore, *Commentary on the Judicial Code*, ¶ 0.03(29), pp. 202-203 (1949 ed.) and the reviser's note to Section 1404(a) which refers to *Baltimore & Ohio R. Co. v. Kepner*, 314 U. S. 44 (1941), a "shopped" Liability Act case, used by the reviser to illustrate the need for the statute.

In refusing to engraft upon the clear meaning of Section 1404(a) "stringent requirements" thought to be derived from the doctrine of *forum non conveniens*, the respondent has correctly applied the statute to facts which, within his discretion, made the transfers appropriate. Refusal to transfer these cases from a forum for which petitioners have "shopped" would have subjected defendant and its witnesses to grave inconvenience and expense. It would have caused a substantial loss to the defendant, regardless of the ultimate outcome of a trial on the merits.

The transfers were necessary for the reasons Congress specified in Section 1404(a)—convenience of parties and witnesses and the interest of justice. By this statute Congress has given district courts the means to administer justice in an orderly and efficient manner.

> "The legislature must see to it that wise and progressive judges are provided with the tools of justice. And the legislative foundation of judicial action must be broad-based and modernized. These objectives this bill [Title 28 U. S. C.] assists in achieving."[31]

Section 1404(a) provides an effective tool for "broad-based and modernized" judicial action. Petitioners' attempts to circumscribe the salutary remedy provided by the clear language of the statute were properly rebuffed by the court of appeals.

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31. Statement of John F. X. Finn, special counsel to the House committee, speaking of the revised Judicial Code. Hearings before subcommittee of Committee of Judiciary of the House on H. R. 2055, 80th Cong., 1st Sess. 44 (1947).

II. A Court of Appeals Should Not Issue Mandamus to Review a District Court's Interlocutory Exercise of Discretion under Section 1404(a).

Petitioners concede that if Chief Judge Kirkpatrick was correct in exercising his discretion to transfer these cases under Section 1404(a) without regard to what he called "the stringent requirements of . . . forum non conveniens" (R. 12), the court of appeals properly refused their applications for mandamus or prohibition.[32] As has been demonstrated in part I, Judge Kirkpatrick correctly understood the scope of the discretion accorded to him by Section 1404(a) and, therefore, the court of appeals properly denied the petitions.[33] Even if it could be said that Judge Kirkpatrick's view of Section 1404(a) was not correct, it would not follow that the court of appeals should have granted the writs of mandamus in these cases. Rather, there were compelling reasons for refusal to review his exercise of discretion by the extraordinary writ of mandamus.

Petitioners concede that an order granting or refusing a transfer under Section 1404(a) is not an appealable order, because it lacks finality.[34] They point out that in the absence of an opportunity to appeal it may be that there is no effective appellate court review of a district judge's action in granting or denying transfer.[35] From this they argue that mandamus was properly available to review a transfer order which, they claim, was improperly entered. This does not follow.

In *Ex Parte Collett*, 337 U. S. 55, 72 (1949), because the transfer involved had been properly granted, this Court

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32. Petitioners' Brief, p. 27.

33. See *Ex Parte Collett*, 337 U. S. 55, 72 (1949), in which this Court did not have to pass upon the appropriateness of the use of mandamus to review transfer orders since petitioner's interpretation of Section 1404(a) was rejected.

34. Petitioners' Brief, p. 27.

35. Petitioners' Brief, pp. 27, 32.

did not reach the question of the availability of mandamus to review transfer orders. It said on that point:

> ". . . we need not decide whether denial might be placed on other grounds also. 'Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies . . . . As extraordinary remedies, they are reserved for really extraordinary causes.' *Ex Parte Fahey,* 332 U. S. 258, 259, 260 (1947)."

In the very recent opinion of Chief Judge Magruder, *In Re Josephson,* — F. 2d — (1st Cir. December 23, 1954 —not yet reported), the court reviewed in detail the development of the mandamus procedure, and outlined the narrow limits of its availability. With reference to a contention such as the petitioners advance in the instant cases, the court said (p. 12 of the unreported opinion):

> ". . . assuming that if the transfer order is ever to be reviewed it must be now, we do not forget that *appellate review is not of the essence of due process* . . . . Particularly, there may be *strong reasons of policy why litigation should not be delayed by appellate review of an administrative order of the sort here involved.* It is not unlike an order by a federal district court remanding a case to the state court from which it had been removed. Here Congress has specifically provided that such an order 'is not reviewable on appeal or otherwise.' 28 U. S. C. § 1447(d), as amended. In certain situations, the fact that a prejudicial order unless presently reviewable can never be corrected on appeal may be a consideration bearing on whether the order is to be deemed a 'final decision' from which an appeal may be taken under 28 U. S. C. § 1291 . . . . But we do not have such a situation here, since it is conceded that the transfer order now in question is an unappealable interlocutory order." (Citations omitted and emphasis supplied.)

Except in special situations not pertinent here, Congress has limited the appellate jurisdiction of the courts of appeal to final judgments and final orders. This facilitates expeditious disposition of cases and prevents piecemeal appeals. If one could successfully argue that, because not appealable, an interlocutory order should be reviewed by mandamus, the congressional purpose of preventing piecemeal appeals would be effectively thwarted. *Roche v. Evaporated Milk Ass'n*, 319 U. S. 21, 30 (1943); *United States Alkali Export Ass'n, Inc. v. United States*, 325 U. S. 196, 202-203 (1945).

A situation comparable to that of the instant cases was presented in *Bankers Life & Casualty Co. v. Holland*, 346 U. S. 379 (1953). There the district court granted a transfer pursuant to 28 U. S. C. § 1406(a), and the court of appeals denied a petition for mandamus to vacate the transfer order. In sustaining denial of the writ, this Court said (pp. 382-383):

> "If we applied the reasoning advanced by the petitioner, then every interlocutory order which is wrong might be reviewed under the All Writs Act [28 U. S. C. § 1651(a)]. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction."

Although the case involved a transfer under Section 1406(a) rather than Section 1404(a), the reason for refusing mandamus is apposite in cases involving Section 1404(a). The extraordinary writ of mandamus is not to be used to substitute the appellate court's discretion for that of the district judge.

In the *Josephson* case, *supra*, the court considered, *inter alia*, the claim that the district judge had abused his discretion in directing a Section 1404(a) transfer. As to this, it said (pp. 14, 15, 16 of the unreported opinion):

> "As to the . . . [contention] that the order of transfer was an 'abuse of discretion' under the cir-

> cumstances, we are clear that as a matter of general policy we ought not to go into that in the present proceeding. 'Abuse of discretion' is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. . . . We do not think that the predominant consideration governing our decision whether to issue the extraordinary writ of mandamus should be that at all costs we must prevent the transfer out of the circuit of every single case that ought to remain here subject to our potential appellate jurisdiction. . . . We do not anticipate that, on balance, our potential appellate jurisdiction will suffer any significant impairment. On the other hand, § *1404(a) provided an administrative facility that was supposed to contribute to convenience and expedition in the disposition of cases. This policy would certainly be defeated if the courts of appeals in the transferor districts should make it a routine practice to hold up the trial of a case pending review on mandamus of the question where the case ought to be tried.* . . .
>
> "Accordingly, we serve notice that in the future, except in really extraordinary situations the nature of which we shall not undertake to formulate in advance, we shall stop such mandamus proceedings at the very threshold, by denying leave to file the petition for a writ of mandamus." (Emphasis supplied.)

The court gave unqualified endorsement to the reasoning in *All States Freight, Inc. v. Modarelli*, 196 F. 2d 1010, 1011-12 (3d Cir. 1952), where Judge Goodrich had likewise "served notice" that mandamus proceedings would

not be allowed to defeat the object of Section 1404(a). As Judge Goodrich put it:

> ". . . the effort is being made both in this court and elsewhere to substitute for appeal a review by mandamus whenever the losing party on a motion to transfer wants an advance review of the ruling on this point.
>
> *"We think that this practice will defeat the object of the statute. Instead of making the business of the courts easier, quicker and less expensive, we now have the merits of the litigation postponed while appellate courts review the question where a case may be tried.*
>
> "Every litigant against whom the transfer issue is decided naturally thinks the judge was wrong. It is likely that in some cases an appellate court would think so, too. *But the risk of a party being injured either by the granting or refusal of a transfer order is, we think, much less than the certainty of harm through delay and additional expense if these orders are to be subjected to interlocutory review by mandamus.*
>
> "We do not propose to grant such review where the judge in the district court has considered the interests stipulated in the statute and decided thereon." (Footnote omitted and emphasis supplied.)

Thus, the Court of Appeals for the Third Circuit has recognized that mandamus to review transfer orders is inappropriate unless the district judge has failed to consider the interest stipulated in Section 1404(a). The Court of Appeals for the First Circuit has similarly indicated that it will not review transfer orders by mandamus except in extraordinary situations the nature of which it has not yet defined.

In the instant cases the respondent, Chief Judge Kirkpatrick, gave careful consideration to the interests stipu-

lated in Section 1404(a). He pointed out that the petitioners were injured in an accident which occurred in South Carolina and discussed the convenience of the parties and their witnesses, concluding that there was a "heavy balance of convenience in favor of the defendant in connection with the liability witnesses" (R. 14). He recognized the conflicting conveniences so far as medical witnesses were concerned. In exercising his discretion in favor of the transfer he also gave weight to the congested condition of the trial calendar in his district, to the plaintiffs' choice of forum, to the residence of the plaintiffs, and to the fact that the only plaintiff who was a resident in the District had previously instituted suit in Chicago. The factors which formed the basis for Judge Kirkpatrick's conclusion that transfer to South Carolina was proper are the same factors which would have been involved in considering a motion for dismissal because of *forum non conveniens*, before enactment of Section 1404(a). This Court summarized those factors in the *forum non conveniens* case of *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 508, 509 (1947), as follows:

> "An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.
>
> • • •
>
> "Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litiga-

tion. . . . There is a local interest in having localized controversies decided at home."

There can be no doubt that Judge Kirkpatrick did not exceed his power to transfer under Section 1404(a). In fact, were *forum non conveniens* still applicable, the circumstances of these cases would have called for a dismissal under that doctrine. Despite their claims to the contrary,[36] petitioners' applications for writs of mandamus in these cases are nothing more than attempts to obtain appellate review of the discretion exercised by Judge Kirkpatrick. The Courts of Appeals for the First and Third Circuits have wisely determined that such attempts, through the use of the mandamus procedure, should be stopped at the threshold. In directing transfers of the instant cases the respondent stated, "the balance of convenience . . . make[s] the transfer proper" (R. 12). Slightly different semantics of "a strong case for a transfer" or "more than a bare balance of convenience" would have satisfied Judges Frank and Learned Hand, respectively, in *Ford Motor Co. v. Ryan*, (182 F. 2d 329 at pp. 330, 332). Whether a judge directing a transfer uses one or the other of these word formulae can hardly be said to create the extraordinary situation calling for the extraordinary remedy of mandamus. Mandamus is not available to probe the thought or word processes incident to the exercise of judicial discretion. Only where the district court has considered interests not pertinent under the statute or where it has ignored factors which must be taken into account is it proper to review a transfer order by mandamus.[37] To further expand the mandamus jurisdiction of the Courts of Appeals would be to ignore Congress' prohibition against piecemeal

36. Petitioners' Brief, pp. 27, 33.

37. As was demonstrated in Respondent's Brief in Opposition to Petition for Writ of Certiorari, pp. 16-19, the decisions of other courts of appeals which have been concerned with use of mandamus to review Section 1404(a) transfer orders are consistent with the views expressed by the Courts of Appeals in the First and Third Circuits.

appeals, and to prevent the use of Section 1404(a) as a tool for wise and progressive administration of justice. In the instant cases, where, in exercising his discretion, the district judge gave due consideration to all the applicable factors (whether derived from Section 1404(a) or from the doctrine of *forum non conveniens*), the court of appeals properly refused to make the mandamus procedure available to the petitioners.

CONCLUSION.

On the facts presented in the instant cases Chief Judge Kirkpatrick correctly exercised his discretion in directing transfer under Section 1404(a). The statute must be taken to mean what it says. To subject it to limitations thought to be derived from the doctrine of *forum non conveniens* would defeat Congress' purpose. Moreover, the interlocutory exercise of discretion to transfer is not reviewable by the extraordinary writ of mandamus. For these reasons the orders of the Court of Appeals, denying the applications for writs of mandamus or prohibition, should be affirmed.

Respectfully submitted,

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Barnes, Dechert, Price, Myers & Rhoads,
Attorneys for Respondent.

SUPREME COURT, U.S.
MOTION FILED MAR 31 1955

IN THE

Supreme Court of the United States

October Term 1954

No. 337

ALEXANDER NORWOOD, *Petitioner*

vs.

HONORABLE WILLIAM H. KIRKPATRICK, etc.

JOSEPH F. TUNSTALL, *Petitioner*

vs.

HONORABLE WILLIAM H. KIRKPATRICK, etc.

JOHN E. SMALLWOOD, *Petitioner*

vs.

HONORABLE WILLIAM H. KIRKPATRICK, etc.

PETITION FOR LEAVE TO FILE BRIEF AND BRIEF FOR AMICUS CURIAE OUT OF TIME

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OUT OF TIME

To the Honorable the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petition of Dining Car Employees Union respectfully represents that:

1. Your petitioner is the duly constituted representative of the railroad dining car employees, whose membership is composed entirely of Negroes including therein the petitioners, Alexander Norwood, John E. Smallwood and Joseph F. Tunstall.

2. Every member of your present petitioner and your petitioner as a group have a vital interest in the outcome of the pending cases since many of its members are frequently exposed to the hazards of railroad accidents occurring in all Southern States.

3. Counsel for your petitioner read the briefs and arguments filed in this case prior to oral argument and believed then that the interests of its members as Negro railroad employees were adequately protected.

4. Petitioner is advised, believes, and, therefore, avers that at the oral argument in this case before your Honorable Court counsel for the plaintiffs therein stated that the fact that the three plaintiffs were Negroes was purely fortuitous and not a determinative factor for the consideration of this Court in deciding this appeal.

5. Your petitioner disagrees with said statement and on the contrary believes the fact of the race of the plaintiffs therein is of great importance in determining the proper decision herein for the reasons set forth in the brief attached hereto.

6. Because of the disagreement with the oral statement of counsel for the plaintiffs, your petitioner does not believe that the position of your petitioner and its Negro members has been adequately presented to this Court.

7. Petitioner avers that it was impossible for petitioner to reach the conclusion set forth in paragraph 6 hereof until after the conclusion of oral argument.

Wherefore, your petitioner asks leave to file a Brief Amicus Curiae out of time.

DINING CAR EMPLOYEES UNION

By EDMOND O. JOHNSON
Edmond O. Johnson, *President and General Chairman*

GEORGE B. PARKS
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BRIEF FOR AMICUS CURIAE OUT OF TIME

ARGUMENT

It has come to our attention that counsel for the petitioners, Alexander Norwood, John E. Smallwood and Joseph F. Tunstall, stated at the bar of your Honorable Court that the race of the petitioner's was incidental, fortuitous and not important in the decision of these cases. With this statement we disagree, although in disagreeing we nonetheless agree with the position of the plaintiffs that

this is not the proper forum for an attack upon an exercise of discretion. However, we believe that the facts of this case sharply emphasize and underline the reasons why the defined limitations of the doctrine of *forum non conveniens* should apply in the application of Section 1404(a). It may be speculated that the racial consideration was at least one of the factors which would have moved Judge Kirkpatrick to retain jurisdiction had he been bound by the limitations of *forum non conveniens.*

In both *Koster* v. *Lumbermens' Mut. Casualty Co.,* 330 U.S. 518 (1947) and *Gulf Oil Corporation* v. *Gilbert,* 330 U.S. 501 (1947), this Court laid great emphasis upon the fact that in those cases, where the Court was called upon to apply the doctrine of *forum non conveniens,* the plaintiffs could point to no sound reason for being in the forum selected. In other words, the plaintiffs there argued merely that it would not be a great inconvenience to the defendant without urging affirmative reasons for the convenience of or justice to those plaintiffs. It is fair inference that had there been such affirmative reasons the doctrine of *forum non conveniens* would not have been invoked in those cases. It is here that the question of race becomes of overweeing importance. Certainly, it is perfectly obvious that the plaintiffs, being as they are northern Negroes, had compelling reasons for selecting a northern forum. What we have said is not to be taken for an instant to be even the slightest breath of criticism of the Federal Judiciary, and we need not affirm our knowledge that a Federal Judge in South Carolina would do all within his power to insure a fair trial, as would any other Judge in any other part of the United States. However, human nature being what it is we have only to present the picture of three northern Negroes trying their cases before a white jury in South Carolina to realize,—not the convenience,—but the apparent necessity to these plaintiffs for the selection of a northern forum.

It is of great significance that regardless of the evidence produced by the defendant these cases must inevitably and

ultimately be decided by a jury, since the derailment of the train in whose operation the plaintiffs were not concerned establishes a *prima facie* case of negligence under the doctrine of *res ipsa loquitur*: *Jesionowski* v. *Boston & M. R.R.*, 329 U.S. 452 (1947).

It is not without significance that the transferee state in this case is that which is most outspoken, both through its legislature and its executive, in its opposition to the recent segregation opinion of this Court in *Brown* v. *Board of Education of Topeka*, 347 U.S. 483 (1954).

This Court has once and for all set at rest any contention that Section 1404 (a) does not apply to actions under the Federal Employers' Liability Act: *Ex Parte Collett*, 337 U.S. 55 (1949). But this Court has also said that the initial choice of venue under Section 6 of the Federal Employers' Liability Act still remains: *Boyd* v. *Grand Trunk Western R. Co.*, 338 U.S. 263, 266 (1949). And yet the Third Circuit's interpretation of Section 1404 (a) in *All States Freight* v. *Modarelli*, 196 F. 2d 1010 (C.A. 3, 1952) has diminished the choice almost, if not quite, to the vanishing point. Balance of the interests under the *Modarelli* rule will almost inevitably result in transfer to the *locus* of the accident. Hence colored plaintiffs injured in the South will inevitably have to try their cases before Southern juries.

A similar constriction of choice faces all railroaders, both negro and white, under the *Modarelli* interpretation. In many of the comparatively small cities in our country, the railroad is the dominating industry. In those cities such as Altoona, Pennsylvania, there is scarcely a family which in some way is not dependent upon the railroad for its livelihood. In such localities a plaintiff is faced with a very real problem in attempting to select a jury which will not be either in fear of or beholden to the railroad. Such employees would have real reason for selecting a forum removed from such influences and yet the mere balance of conveniences as suggested in the *Modarelli* opinion would force them back to the unreceptive atmosphere.

We point this out merely to emphasize the problem with which the Negro is faced in being forced to try his case before a Southern jury and also to point out why not only in these present cases but in all cases under Section 1404 (a) the limitation, weights and balances of the doctrine of *forum non conveniens* should be applied and not the loose balancing of *Modarelli*. A striking and distressing off-shoot of the *Modarelli* interpretation is evident here, where one of the plaintiffs actually lives and was medically treated in the district where suit was started. Yet he is being forced into a hostile district, far removed from his home and witnesses.

Again without attempting to relitigate or even to question the result in *Ex Parte Collett*, 337 U.S. 55 (1949), and recognizing fully that Section 1404 (a) applies to such actions as these, we point out that this type of case is an emphatic illustration of why the *criteria* of *forum non conveniens* should be adopted.

Congress has seen fit to grant affirmatively by positive legislation unrestricted choice of forum under Section 6 of the Federal Employers' Liability Act. Congress has also seen fit not to repeal the grant of that choice in spite of efforts to persuade it to do so: See *Pope* v. *Atlantic Coast Line R. Co.*, 345 U.S. 379 (1953). What we are saying is simply this: Of course, Section 1404 (a) applies to this class of case but in order to effectuate the manifest intent of Congress it must be applied, not with a mere balance of conveniences, but with great weight given to the plaintiffs, choice of forum. In short, we say that Section 1404 (a) should be applied within the delineations of the doctrine of *forum non conveniens* and that only such application will express the Congressional intent.

The cases presently before this Court and the interests of this Union are sharp reminders of the necessity for such a construction. If these and other Negro railroaders injured in the South are to be relegated to Southern juries for the trial of cases occurring in the South, the choice of Section 6 is a chimera. Such would not be the result in

these cases had Section 1404 (a) been interpreted as the equivalent of the doctrine of *forum non conveniens* and for this statement we need go no further than the opinion of Judge Kirkpatrick.

We do not seek a repeal of Section 1404 (a). We do not seek a removal of Federal Employers' Liability Act cases from Section 1404 (a). What we do seek for the members of this Union is an orderly continuation of Section 1404 (a) applicable alike to all actions but one which will be within defined bounds and which will give to the initial choice of forum the weight traditionally attached to it by the doctrine of *forum non conveniens*. Such an interpretation will result in uniform application of the section. It will place choice of forum in its proper perspective. It will not result in a mere balancing of conveniences. And in these cases before the Court, it will result in a retention rather than a relinquishment of jurisdiction.

More broadly, however, it will mean that the Negro members of this Union who actually live in the North, who are treated by Northern doctors, who cannot afford the financial burden of transporting those doctors to distant jurisdictions, who cannot face with confidence a Southern white jury, will be able to exercise the right given by Section 6 of the Federal Employers' Liability Act with the knowledge that that right has some practical value. Such a result can be reached only by applying what seems to be the plain intent of Congress that Section 1404 (a) is *forum non conveniens*. The outcome of these cases is of importance to these plaintiffs, but it is of transcending importance, multiplied many times, to this Union and its negro members.

This Court does not and must not permit itself to live in an ivory tower. The miscarriage of justice that ultimately resulted in the case of *Atlantic Coast Line R. Co. v. Davis*, 185 F. 2d 766 (C.A. 5, 1950) is a blot upon American Jurisprudence. The litigation involving this poor colored widow's rights under the Federal Employers' Liability Act concluded with a verdict for the railroad despite

the fact that her husband was killed by the sheerest and clearest type of negligence while in the employ of the railroad company. In that case her counsel in recognition of the racial prejudice problem had instituted suit in New York though the accident occurred near Jacksonville, Florida.

Under the holding of this Court in *Ex Parte Collett*, supra, the litigation was transferred back to Jacksonville. A great and able Judge, Dozier A. DeVane presided over the trial. Despite every effort exerted by him to achieve a fair result, two white juries were unable to agree upon a verdict. That fair minded Southern Judge, recognizing that the climate was inimical to a fair trial for that colored widow, ordered the case back to New York so that justice might prevail. Regardless of the legal accuracy of his exercise of this power which was reserved by the Court of Appeals for the Fifth Circuit, the principle involved is paramount. It is a recognition by an experienced trial Judge aware of this problem that despite every effort made by him to achieve even and fair justice, he was unable to control the jury.

How then can any one say that the color question is not of tremendous importance in these motions and in the consideration of the legal question here involved. This case is an outstanding example pointing up the reason for confining a Trial Judge's exercise of discretion in deciding questions under 1404 (a) to the limitation of "forum non conveniens". That case should never have been transferred out of New York in the first place nor should these cases be transferred to South Carolina today. It was consideration of factors of this nature that led Congress to grant special venue privileges to railroaders.

Respectfully submitted,

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